Supreme Court, U.S.
FILED

95 1599 APR 03 1996

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RADOVAN KARADZIC,

Petitioner,

vs.

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Respondents,

and

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether claims by aliens in former Yugoslavia against the political leader of a faction in former Yugoslavia, proclaimed to be the Bosnian Serb Republic of Srpska but not recognized by any other nation, based on alleged violations in former Yugoslavia by Bosnian Serb armed forces of the law of nations and international treaties, conventions and protocols governing genocide, war crimes and crimes against humanity are cognizable in the United States courts under the Alien Tort Statute or the federal question jurisdiction statute.

2. Whether the conduct of a non-state actor can constitute a violation of the law of nations or of international treaties, conventions and protocols even if not self-executing against genocide, war crimes, and crimes against humanity, and if so, whether they can serve as the basis for imposing civil liability in a private action under the Alien Tort Statute or the federal question jurisdiction statute when the law of nations and relevant treaties are concerned only with criminal responsibility for violations of state actors in courts with jurisdiction.

3. Whether the alleged acts of torture and summary execution for which respondents seek to hold petitioner liable were committed under actual or apparent authority or color of law of a foreign nation for purposes of the Torture Victims Protection Act and are otherwise cognizable under that Act.

4. Whether this case should be dismissed because it is nonjusticiable or presents political questions inappropriate for judicial determination or both.

5. Whether the essential functions of the United Nations are protected by immunity from service of process to persons such as petitioner during trips to United Nations Headquarters in New York solely to participate in peace negotiations or other essential functions at the urgent request of officials of the United Nations and the United States.

6. Whether the assertion of jurisdiction by a United States court in this case over parties living in former Yugoslavia with no presence or property in the U.S. and over conduct occurring in former Yugoslavia having no connection with the United States depending entirely on questionable service of process during two brief trips to participate in peace negotiations at the United Nations violates due process of law under the Fifth Amendment and exceeds the powers of the federal courts under Article III of the Constitution.

7. Whether this action should be dismissed on grounds of forum non conveniens.

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Opinions in the Case

The opinion of the Court of Appeals deciding the appeals in Kadic v. Karadzic and Doe v. Karadzic is reported at 70 F.3d 232 (2d Cir. 1996), A1; its decision denying rehearing is reported at 74 F.3d 377 (2d Cir. 1996), A41. The District Court's opinion is reported at 866 F.Supp 734 (SDNY 1994), A45.

Basis for Jurisdiction

The judgments sought to be reviewed were entered on October 13, 1995. The orders denying petitioner's timely petition for rehearing were filed on January 26, 1996, A66, based upon a decision denying rehearing that was date stamped "JAN-4 1996" on the typewritten copy received by petitioner from the Court of Appeals and entered on the Court's docket as filed on January 4, 1996 (as a "nondispositive opinion"), but is reported as decided on January 6, 1996, 74 F.3d 377 (2d Cir. 1996), A41. 28 U.S.C. §1254(1) is the statutory provision which confers jurisdiction on this Court to review the judgments in question on a writ of certiorari.

Constitutional Provisions, Statutes and Treaties Involved

This case involves the due process of law provisions of the Fifth Amendment to the U.S. Constitution and the provisions of Article III with respect to the scope of the powers of federal courts in cases having no nexus with the United States.

28 U.S.C. §1350. Alien's action for tort

The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

The Torture Victim Protection Act of 1991, Note following 28 U.S.C. §1350:

Section 1. Short Title.

This Act may be cited as the "Torture Victim Protection Act of 1991.

Section 2. Establishment of civil action.

(a) Liability. -- An individual who, under actual or apparent authority, or color of law, of any foreign nation --

(1) subjects an individual to torture shall, in civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) Exhaustion of remedies. -- A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) Statute of limitations. -- No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

Section 3. Definitions.

(a) Extrajudicial killing. -- For the purposes of this act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) Torture. -- For the purposes of this Act --

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain and suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) Mental pain or suffering refers to prolonged mental harm caused by or resulting from --

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Other Federal Statutes involved include: the Genocide Convention Implementation Act of 1987, 18 U.S.C. §1091 (1988) and the Torture Convention Implementation Act of 1994, 18 U.S.C. §2340-40(B).

Numerous international treaties, conventions and

protocols are advanced by respondents in support of their actions; some of these are quoted in part or cited by the Court of Appeals, see e.g. re: genocide, A16-19, war crimes, A19-22; torture and summary execution, A22-23.

Statement of the Case

In February and March 1993 petitioner, Radovan Karadzic, made three brief trips from former Yugoslavia to New York at the urgent invitation of high level officials of the United States and the United Nations including President Clinton and U.N. Secretary General Butros Butros Ghali for the sole purpose of participating as President of the newly proclaimed though not internationally recognized Bosnian-Serb Republic in peace negotiations at the United Nations headquarters in New York seeking to bring the war in former Yugoslavia to an end.

There was considerable official and public opposition to the issuance of a visa permitting petitioner to enter the United States, leading Assistant Secretary of State Richard Boucher to explain at a press briefing on February 2, 1993 that his admission was required by the Headquarters Agreement:

> MR. BOUCHER: We have approved a C-2 visa, which relates to U.N. activities, for Radovan Karadzic, so that he can participate in the continuing negotiations of the International Conference on the Former Yugoslavia, meetings which are going to be held at the United Nations in New York.
>
> * * *
>
> ... He's coming here because the U.N. mediators and negotiators felt it was important that he be here to participate in U.N. activities. And, of course, we have an obligation under the Headquarters Agreement that we have with the United Nations to permit entry of people who are invited to U.N. Headquarters for official business.

The next day Mr. Boucher announced that further restrictions would be imposed on petitioner's movements:

> MR. BOUCHER: Yesterday, as I was speaking on this subject, there were discussions continuing in this building on the exact restrictions to be placed on Mr. Karadzic's visa.
>
> The normal restriction on the C-2 visa, which is transit to the United Nations, is a 25-mile limit. But for purposes of security, we've asked the Immigration and Naturalization Service to place further restrictions on Mr. Karadzic's travel in the United States. We expect that his travel will be restricted to direct transit to and from U.N. Headquarters and to movement within a 10-block radius of U.N. Headquarters.

During these trips the United States government provided petitioner with a large 24 hour a day protective force from the moment of his arrival to his actual departure through federal law enforcement officers of the Diplomatic Security Service of the State Department. These trips are the only contacts with, or presence in the United States by any of the parties. No party is alleged to have property in the United States.

At the end of the first trip, on the evening of his departure, as petitioner exited from the hotel restaurant and crossed the lobby to the elevator surrounded by his security detail, a man who had been sitting in the lobby approached the security detail and made a dangerous effort to serve papers, shouting and reaching into his coat for what turned out to be papers and dropping them to the floor as he was seized by U.S. agents and prevented from reaching petitioner. This is the service of process claimed by plaintiffs in Doe v. Karadzic.

During his second trip to New York, papers in Kadic v. Karadzic were delivered to Radovan Karadzic by the head of the security detail as provided in an order issued under seal by

the federal District Court in Manhattan.

Both of these actions against petitioner were brought by persons and classes of persons living in former Yugoslavia who alleged they were victims or representatives of victims of atrocities committed in former Yugoslavia by Bosnian and Serb armed forces during the course of the war in or near Bosnia and Herzegovina for which they allege petitioner was responsible. Jurisdiction was alleged under the Alien Tort Statute, the Torture Victim Protection Act ("TVPA"), federal question jurisdiction, 28 U.S.C. §1331 and supplemental jurisdiction, 28 U.S.C. §1367. The complaints charged petitioner with alleged violations of the law of nations, and numerous statutes and international treaties, conventions and protocols. Plaintiffs sought damages and in Kadic also sought injunctive relief.

Petitioner moved before answer to dismiss the complaints under Fed.R.Civ.P. 12(b)(1), (2), (4), (5) and (6) on grounds of lack of subject matter and personal jurisdiction, including immunity as an invitee of the United Nations, insufficiency of process and service of process and nonjusticiability of plaintiffs' claims.

In an opinion reported at 866 F.Supp. 734 (S.D.N.Y. 1994), A45, the District Court dismissed both actions for lack of subject matter jurisdiction.

Respondents appealed. Following oral argument, the Court invited the Attorney General of the United States to submit the views of the United States. The United States filed a statement of interest which argued for reversal and remand, taking Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) as its starting point as "the law of this Circuit concerning the Alien Tort Statute," at 4, but did so on grounds much narrower than the grounds that respondents espoused and the Court of Appeals ultimately adopted.

The United States took the position that the District Court erred in dismissing all of plaintiffs' claims on the ground petitioner is not a state actor. It deemed this error to require reversal, at 14, in order for the District Court on remand to determine an issue the Court of Appeals subsequently decided itself, i.e. "whether the claims based on violations of customary international law governing genocide, war crimes, and crimes against humanity alleged by plaintiffs are otherwise properly cognizable in a suit brought under the Alien Tort Statute." Id.

And the United States took the view that respondents' claims of violations of several international conventions "are not actionable on their own under the Alien Tort Statute because these conventions are not self-executing," at 15.

The United States failed to address the viability of respondents' claims under the TVPA and their assertion of federal question jurisdiction, but it addressed the issue of forum non conveniens to stress the general importance of the doctrine "in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here." at 18.

In an opinion reported at 70 F.3d 232 (2d Cir. 1996), A1, the Court of Appeals reversed the District Court, upholding subject matter jurisdiction under the Alien Tort Statute and the TVPA, without reaching federal question jurisdiction under §1331. The Court rejected petitioner's claims for immunity from service of process under the U.N. Headquarters Agreement and under federal common law. It remanded the case for further proceedings.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. The panel denied the petition in an opinion reported at 74 F.3d 377 (2d Cir. 1996), rejecting the thesis advanced by Prof. Sweeney in A Tort Only In Violation Of The Law Of Nations, 18 Hastings Int'l. & Comp. L. Rev. 445 (1995), that the scope of the Alien Tort Statute should be limited in accordance with the original intent of the draftsmen

in 1789 to damages in prize cases. The Court noted that "however we might have construed the Alien Tort Act in a case arising in 1789," its interpretation two hundred years later was guided by the controlling case in the Second Circuit Filartiga v. Pena-Irala, supra, and by the Court's view that Congress codified Filartiga and extended it to U.S. citizens in the TVPA in 1991. No vote was requested or taken on the suggestion for rehearing en banc.

This petition follows.

Reasons for Granting the Writ

I. The Decision Below Is In Conflict With Decisions Of This Court, Other Circuits And Acts Of Congress

After two centuries of virtual non-use the Alien Tort Statute has been invoked as the jurisdictional basis for tort actions against individuals who were foreign government officials alleged to be responsible for tortious acts such as official torture held to be violations of the law of nations. See Filartiga v. Pena-Irala, supra, now cited in more than 30 cases by the federal Courts of Appeals, 40 cases by the federal district courts and over 365 texts and periodicals. For a recent case following Filartiga and the decision of the Court of Appeals below, see Abebe-Jira v. Negewo, 72 F.3d 844, 847-48 (11th Cir. 1996).

This Court has not considered this development. It has referred to Filartiga in only one case, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 433, 436 (1989), in which this Court rejected the Second Circuit's ruling, 830 F.2d 421, based in part on Filartiga, that jurisdiction could be exercised over Argentina as a defendant under the Alien Tort Statute after enactment of the comprehensive Foreign Sovereign Immunities Act ("FSIA").

In the present case, the Court of Appeals has extended

Filartiga's rule which held official acts may violate the law of nations, to hold

> certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. A12.

The Court of Appeals did not reach the issues whether there is jurisdiction under 28 U.S.C. §1331, or 28 U.S.C. §1367.

The decision conflicts with Sanchez-Espinosa v. Reagan, 770 F.2d 202 at 206-7 (D.C.Cir. 1985), where alien plaintiffs alleged Contras carried out scores of attacks upon innocent Nicaraguan civilians, summary executions, murder, rape and other acts:

> We are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations -- so called "customary international law," arising from "the customs and usages of civilized nations," The Paquete Habana, 175 U.S. 677, 700, 20 S.Ct. 290, 299, 44 L.Ed. 320 (1900) -- we conclude that this also does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in Tel-Oren v. Libyan Arab Republic, 726 F.2d at 791-96 (Edwards J., concurring); see also id. at 807 (Bork, J., concurring).

See, Tel-Oren v. Libyan Arab Republic 726 F.2d 774 (D.C.Cir. 1984), cert. denied, 470 U.S. 1003 (1985):

> The question therefore arises whether to stretch Filartiga's reasoning to incorporate torture perpetrated by a party other than a recognized state or one of its officials acting under color of state law. The extension would

> require this court to venture out of the comfortable realm of established international law -- within which Filartiga firmly sat -- in which states are the actors. 726 F.2d at 792, Judge Edwards, concurring.

See also, Hamid v. Price Waterhouse, 51 F.3d 1411, 1417-18 (9th Cir. 1995), discussing but not reaching the issue whether the law of nations applies to purely private conduct.

The District Court below which was reversed by the Court of Appeals held that it lacked subject matter jurisdiction because acts committed by individuals, non-state actors, do not violate the law of nations and therefore are not cognizable under the Alien Tort Act. It also rejected jurisdiction under the Torture Victims Protection Act, 28 U.S.C. §1331 and 28 U.S.C. §1367. Its careful and detailed analysis correctly states the law. See A45 et seq.

The decision of the Court of Appeals below is in conflict with decisions of this Court and relevant acts of Congress. As an illustration, the Torture Victims Protection Act which has been called a partial codification of Filartiga, applies as the District Court held in rejecting respondent's claims of jurisdiction under the TVPA, A59 et seq., only to acts "under actual or apparent authority, or color of law, of any foreign nation." TVPA, Sec. 2(a). It also requires a plaintiff to exhaust remedies in the nation where the conduct alleged occurred. Id. Sec. 2(b). Despite these provisions, the Court of Appeals has held the alleged atrocities, including torture, actionable under the Alien Tort Statute "without regard to state action, to the extent they were committed in pursuit of genocide or war crimes...." A23.

This is the same error the Court of Appeals had made in Argentine Republic v. Amerada Hess, supra, where this Court rejected the Court of Appeals analysis and reversed its decision stating:

> The Court of Appeals reasoned that Congress' enactment of the FSIA was not meant to eliminate "existing remedies in United States courts for violations of international law" by foreign states under the Alien Tort Statute. 486 U.S. at 433.

After "having determined that the FSIA provides the sole basis for obtaining jurisdiction over a foreign state in federal court," this Court examined the FSIA to see if any exemptions applied. 488 U.S. at 493. Amerada Hess cited the exception in FSIA for non-commercial torts, §1605(a)(5) as most in point. This Court held the statute was limited by its own terms and applied only to injuries occurring in the territorial jurisdiction of the United States. 488 U.S. at 440-41. As against a sovereign and persons acting under its authority, tort claims for injuries occurring outside the territorial jurisdiction of the United States arising from violations of the law of nations brought in federal courts are barred by the FSIA. Argentine Republic v. Amerada Hess, supra; see Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 713-23 (9th Cir. 1992), cert. denied, 507 U.S. 1017 (1993); cf. In Re Estate of Marcos, 25 F.3d 1467, 1468-76 (9th Cir. 1994), cert. denied, 115 S.Ct. 934, 130 L.Ed.2d 879 (1995).

The same approach taken in Filartiga is taken by the Court below regarding the Genocide Convention Implementation Act of 1987, 18 U.S.C. §1091 (1988) which criminalizes acts of genocide. The Act provides that it "shall not be construed as creating substantive or procedural rights enforceable in any proceeding." §1092. Yet the Court of Appeals holds acts of genocide by private persons are actionable under the Alien Tort Statute. Because the Genocide Convention imposes criminal sanctions which demand personal responsibility for violations, it includes private individuals who violate its provisions. As at Nuremberg, such private individuals are included only when acting in concert with the state. The decision below conflicts directly with Amerada Hess on these issues.

The reference in the legislative history of the TVPA to 42 U.S.C. §1983 for aid in the interpretation of the meaning of its use of the phrase "color of law" is instructive. Congress limited the reach of §1983 to state action, or action under color of law, which includes concerted action and acts in symbiotic relationship between the state and private individuals. This is a standard common to all our civil rights laws for important reasons of federalism.

The decision below violates clearly established principles embodied in §1983 and conflicts with innumerable decisions thereunder. Purely private conduct, no matter how wrongful, is not reached by §1983. See, NCAA v. Tarkanian, 488 U.S. 179, 191 (1988). The Court of Appeals decision provides redress for aliens in U.S. courts for human rights violations committed by private actors in foreign nations that is denied under our civil rights laws to U.S citizens similarly injured by private actors within the U.S.

In addition, no treaty relied on by the appellants is self executing and therefore no treaty can be the basis for federal jurisdiction directly, or under the Alien Tort Statute. See Statement of Interest by the United States, pp. 15-18. The decision below conflicts with the implementation acts of the treaties relied upon.

Congressional assertions are clear and consistent that these treaties do not provide a basis for civil actions in the U.S. and that Congress believed no other basis for jurisdiction existed, otherwise its assertions are meaningless. See, Torture Convention, 18 U.S.C. §§2340-2340(B), at §2340(B) (1994); Genocide Convention, 18 U.S.C. §§1091-1092 at §1092 (1988). This decision conflicts with those Congressional acts.

The implementation acts for these treaties show that Congress did not believe a private remedy was "already available under the Alien Tort Act." After 200 years there was no existing law which might have suggested to the Congress that such private remedies were available for private non-state

acts. By their very nature, the conduct addressed in these conventions is the conduct of state actors. It makes no sense for Congress to close the doors of the courts of the United States to actions based directly upon these vital contemporary treaties, only to permit the treaties to be considered actionable in U.S. courts as part of the law of nations under the Alien Tort Statute or under 28 U.S.C. §1331. The Congress has consistently acted to prevent private actions for torts committed overseas, except in its codification of Filartiga in the TVPA where it requires state action and equitably adds jurisdiction for such actions when brought by U.S. citizens who are not included in the Alien Tort Statute.

The Court of Appeals' several references to authorities holding individuals responsible under international law, see e.g. A16-18, confuses individual responsibility for criminal acts with private actions for purely private conduct, failing to recognize all its references are to acts by private individuals acting under color of law. A crowning achievement of the Nuremberg principles is the establishment of individual responsibility for crimes against peace, war crimes and crimes against humanity, but every act charged against an individual, including industrialists was committed in concert with the Nazi government. Had Jack the Ripper privately plied his trade in Heidelberg during the war, he would not have been brought before the International Tribunal at Nuremberg, but before a criminal court in Heidelberg.

Reliance by the court below on international law related to piracy, slave trade, attacks on and highjacking of aircraft, attacks on ambassadors and other officials is misplaced. These are acts against all humanity because they occur in international areas, or they directly affect a nation outside its territory, or they affect more than one nation. They involve international commerce and protection of diplomatic officials outside their own country. Piracy on the high seas, unlike piracy on Lake Placid, is a concern of all nations because it cannot be controlled by the laws of any one nation. The same is true of international slave trade, attacks on international air

traffic and protection of diplomats. The interests and functions of every nation are threatened by such conduct which may be directly against its officials, ships, aircraft, or citizens and which it cannot control alone where multiple sovereignties, or foreign, or international space are involved.

The lengths to which interpretations of a long unused statute may depart from its original intent are suggested by recent research on the Alien Tort Statute. The genealogy of "[t]his old and little used section... a kind of a legal Lohengrin... no one seems to know whence it came," Friendly, C.J., ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975), has been discovered finally by the exhaustive research of a prominent international law scholar. The startling conclusion is that every word in the Alien Tort Statute, including "only," counted and Congress clearly intended to cover "only" prize cases. See, Joseph Modeste Sweeney, A Tort Only In Violation of the Law of Nations, 18 Hastings Int'l & Comparative L. Rev. 445 (Spring 1995). Delightfully the hand that wrote the cryptic phrase "... for a tort only, committed in violation of the law of nations or a treaty of the United States," was Oliver Ellsworth, id. at 448.

As Professor Sweeney shows, there is no basis in the Alien Tort Statute for expanding its reach beyond its strict limitation to wrongs prohibited by the law of prize including treaties of the United States dealing with prize matters. To stretch the scope of the act to transitory tort actions arising anywhere in the world from violations of the law of nations, or treaties of the United States is beyond the wildest dreams of the Congress. Neither subsequent congressional acts nor the handful of cases brought under the Alien Tort Statute over 200 years have created a basis for expanding its original application. See David J. Bederman, The Feigned Demise of Prize, 9 Emory Int'l L.Rev. 31, 53-64 (Spring 1995); Alfred P. Rubin, U.S. Tort Suits by Aliens Based on International Law, 18 Fletcher Forum of World Aff. 65 (1994)(Filartiga "fundamentally mistook the distribution of legal powers within the current international legal order, essentially misread the

Judicature Act, and created a framework for national assertions of tort jurisdiction that the United States itself would strongly protest if used by other states against American defendants." at 66).

This Court denied certiorari in Tel-Oren after requesting and receiving a brief from the United States urging denial of certiorari, 24 I.L.M. 427 (1985); see also Comment, Enforcing the Customary International Law of Human Rights in Federal Court, 74 Calif. L.Rev. 127, 152-54 (1986). It is abundantly clear from the statement the United States filed below, that whatever its view may be on the advisability of certiorari review of the present case -- a view that may well be controlled by political rather than legal considerations -- the United States disagrees on the merits with the unqualified green light the Court of Appeals has given respondents to proceed with their claims under the Alien Tort Statute on remand. Contrary to the Court of Appeals, the United States has said the cognizability of claims under the Alien Tort Statute needs to be determined on remand, that the conventions upon which respondents rely fail to create independent causes of action in respondents' favor because they are not self-executing and that the issue of forum non conveniens is important where the parties and the conduct have so little contact with the United States.

Now, more than ever, as Judge Harry T. Edwards pleaded a dozen years ago this is "an area of the law that cries out for clarification by the Supreme Court." Tel-Oren v. Libyan Arab Republic, supra, 726 F.2d at 775.

II. This Unprecedented Vast Expansion Of The Alien Tort Statute Would Likely Place An Enormous Strain, Not Only On Our Courts, But Upon Our Country's Diplomatic Relations With Any Number Of Foreign Nations And Will Prove Futile And Frictive While Failing To Serve Justice

The breathtaking sweep of the jurisdictional claim the Court of Appeals asserts is that the Alien Tort Statute

> ... enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. A4.

All the plaintiffs are aliens living in or near Bosnia and Herzegovina. None are known to have ever set foot in the U.S. All the events, involving thousands of class action plaintiffs, unnamed and unknown, and potentially thousands of witnesses occurred in, or near, Bosnia and Herzegovina. The defendant lives, as he always has, in former Yugoslavia, though he studied poetry in the U.S. in the 1970s and made three short trips here in early 1993 to participate in continuing peace negotiations at the United Nations headquarters at the urgent request of the U.N. There is no physical presence of any party and no property, or interest in property owned by any party in the U.S.

The injuries alleged are a minuscule part of the total injuries that occurred in 1992 in former Yugoslavia, not to consider the greater violence in the following years in a widespread brutal conflict that remains the single greatest concern and responsibility of all the people, governments, courts, institutions and organizations in Bosnia and Herzegovina and surrounding nations.

Plaintiffs have made no effort to sue in Bosnia and Herzegovina, or Croatia, or elsewhere in former Yugoslavia where courts have continuously been open for both criminal and civil cases arising from the conflict.

The only physical nexus to the United States was defendant's entry here to participate in peace negotiations at the U.N. at its urgent invitations during which two efforts to serve him with process were made by plaintiffs. In Filartiga, In re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992), two lead cases, as in all the prior cases involving tort claims by aliens against former government officials who were state actors, the defendants were living in the U.S. and could be found only here.

There is no precedent in which a U.S. court has asserted jurisdiction in a case with so little contact with the United States. There is no precedent in which a U.S. court has claimed jurisdiction over torts committed anywhere in the world, if brought by an alien for violations of the law of nations whether committed by state or private actors.

The FSIA, as this Court has noted, requires substantial contact with the United States where it provides a foreign sovereign no immunity from suit in the U.S.:

> Congress was aware of concern that "our court [might be] turned into small 'international courts of claims[,]'... open... to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world." Testimony of Bruno A Ristau, Hearings on HR 11315, at 31. As the language of the statute reveals, Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. §1605. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 490 (1983).

The FSIA also waives sovereign immunity for torts only where they occur in the United States, thus avoiding the issues and burdens arising from a claim for such jurisdiction worldwide. 28 U.S.C. §1605(a)(5). See Argentine Republic v. Amerada Hess, supra; McKeel v. Islamic Republic of Iran, 772 F.2d 582 (9th Cir. 1983), cert. denied, 469 U.S. 880 (1984).

To hold jurisdiction over an alien sued by an alien for acts entirely in another country solely on the basis of service of process on that alien during a short trip to the United Nations would implicate the Due Process Clause and offend traditional notions of fair play and substantial justice. See, International Shoe Co. v. Washington, 362 U.S. 316 (1945).

The exercise of jurisdiction over a suit in which parties are aliens, have no presence, or property in the U.S. and the acts on which the suit is based all occurred in another country exceeds the constitutional limits of federal court jurisdiction created by Article III of the United States Constitution.

The vastness of the litigation potential from such universal jurisdiction is beyond calculation. Consider only the millions of victims of governments and factions engaged in armed conflicts in Angola, Lebanon, Israel, the Palestine Authority, Chechnya, Tibet, Rwanda, Liberia, Guatemala, El Salvador, Cambodia, Kashmir, Sri Lanka and all the other countries torn by conflict at the end of this most violent century of mankind. Can U.S. courts be the bully pulpit, or the tort claims forum for all the world's misery if only some defendant can be tagged with one foot on U.S. territory or reached by service overseas? Is the world ready for American tort law?

What would it mean if all countries created such universal extraterritorial jurisdiction? Imagine the opportunities provided by such litigation for harassment and political propaganda against unpopular factions, governments and individuals. Consider the potentials for forum shopping and the impact on tourism and foreign investment from the risks of such litigation.

Can damages assessed in materialistic America involving chance parties, but never immune governments, who know nothing of its values, culture, courts or procedures possibly protect human rights? How can any but the very rich overcome the burden of presenting a defense? No benefit can result from such a vast and interventionist claim of jurisdiction over people and events worldwide, just increased emotional conflict and failed expectations arising from disputes that can only be resolved among the parties, and burdened U.S. courts unable to effectively adjudicate distant clashes of armed forces unreachable by compulsory process.

Who in Rwanda or Bosnia would imagine bringing a lawsuit in the U.S. for loss of family members in factional atrocities committed there when none of the parties live or own property in the United States? Who could afford to bring such an action? How could the cases be meaningfully tried? How would witnesses be compelled to appear, or documents produced? How could the parties ever understand what was happening? Is it not clear that fair trials of such massive cases at so great a distance with no judicial power to compel performance are impossible, that due process cannot be provided?

Only lawyers and organizations interested in the politics of a foreign region, in making a political statement about human rights under law without any reasonable expectation of protecting human rights or recovering damages could bring such suits except under the special circumstances of rich foreign interests, or foreign interests with valuable property here.

What is the meaning and what are the possible consequences of parties, plaintiff and defendant living within miles of each other, perhaps in the same jurisdiction, litigating death cases that occurred there in a foreign forum half a world away? Not even Imperial Rome summoned the rest of the world to seek redress of wrongs in its forum. With no local institutions involved in the proceedings how can judgments be

enforced?

In addition to the other worldliness of such global jurisdiction, its futility must be considered. No court, or lawyer, and only a delusional plaintiff can hope that any damages awarded might be recovered, or an effective injunction might be entered in such a proceeding. There are no parties, or assets in the U.S. There are probably no assets anywhere in most cases against individual defendants living in impoverished and war torn parts of the world. If there are assets, they are almost surely in the forum where the parties live. If the forum there is not functioning for the purpose of entertaining civil actions, can it be expected to execute a foreign judgment on property in its jurisdiction? And an injunction issued by a U.S. court seeking to restrain conduct in other countries of people living there with no possibility of enforcement against people there is too long and thin a tether to support its own credibility.

Such grandiose ex parte extraterritorial jurisdiction cannot be asserted without harmful consequences. It remains true and essential as Chief Justice Marshall wrote that, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." Marbury v. Madison, 5 U.S. 137, 163 (1803). It is difficult to imagine violations of rights to which this principle ought to apply with greater force than human rights. But the remedy cannot be provided world wide by single nations acting alone. Injury cannot be prevented by private tort actions. Without peace keeping systems involving effective international effort the widespread violence the world is experiencing will grow and private litigation for damages will be a mere aggravant directed by those with means. To play any constructive role private tort litigation will require either international tribunals, or treaties defining jurisdiction over torts committed in other countries. Otherwise human rights litigation will be merely the continuation of war by other means.

The International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda processing war crimes cases from former Yugoslavia and Rwanda have requested governments to avoid prosecutions that might interfere with their proceedings and to cooperate with their investigations and provide evidence. These tribunals have some international backing and some prospect for advancing peace through law. Private tort litigation in national courts with potential world wide jurisdiction and no international support, or regulation can only produce more chaos.

Concern for the enormity of potential tort litigation from international human rights violations was recently expressed by a Court of Appeals when considering a claimed exception to the FSIA in a case seeking money damages for injuries and compensation for slave labor while a prisoner in Nazi Germany during World War II:

> We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of §1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day -- unless disrupted by our courts, that is. Princz v. Federal Republic of Germany, 26 F.3d 1166, n. 1 at 1175 (D.C.Cir. 1994), cert denied, 115 S.Ct. 923, 130 L.Ed.2d 803 (1995).

Princz could not seek jurisdiction under the Alien Tort Act because he is an American citizen. Nor could a U.S. citizen who lived in former Yugoslavia and suffered the very injuries alleged by plaintiffs in these cases sue in U.S. courts for torts in violation of the law of nations under the Alien Tort Statute.

The frequent purpose of suits like this one under the Alien Tort Statute claiming human rights violations will be to make a political statement. An inescapable consequence is to inject U.S. institutional power into foreign disputes on behalf of one side, the side that brings an action. However limited the actual power of the courts, the litigation will be seen as hostile to the faction sued and potentially create enmities toward the U.S. and claims of U.S. judicial imperialism that can impair, or frustrate, the executive branch which cannot control the litigation in its conduct of foreign affairs. Our courts will have very limited power to assure access to facts by court processes and risk one sided submissions and default judgments as has been the pattern so far. That will give the U.S. courts an image of partiality. Justiciability of such cases is an important issue.

The determination of justiciability is the responsibility of the Judicial Branch. This case meets the criteria established in Baker v. Carr, 369 U.S. 186, 217 (1962), which led Judge Robb to conclude that dismissal of the claims in Tel-Oren, supra, was required for nonjusticiability. Both cases involve standards that defy judicial application, Tel-Oren, 726 F.2d at 823-24, questions that touch on sensitive matters of diplomacy and foreign policy that uniquely demand a single voice and policy by the United States government, Tel-Oren at 824-25, and questions connected to conduct of war and achievement of peace of a kind that have historically been within the exclusive domain of the executive and legislative branches. Tel-Oren at 826-27. Here, far more than in Tel-Oren, the possible consequences of judicial action may be injurious to the national interest.

A dismissal for nonjusticiability is without prejudice.

Plaintiffs' claims have been and remain justiciable in former Yugoslavia.

The General Framework Agreement for Peace in Bosnia and Herzegovina prepared during the Proximity Peace talks at Wright-Patterson Air Force base in Dayton, Ohio, November 1-21, 1995, has been ratified by the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia. See U.N., G.A., 50th Sess., Agenda item 28, A/50/790, S/1995/999, 30 November 1995. It establishes anew that courts where the parties live and the events occurred whether in Croatia, Yugoslavia, or Bosnia and Herzegovina including the Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska are open and available.

The new Constitution of Bosnia and Herzegovina, Annex 4 to the agreement, creates a Constitutional Court of nine members, four elected by the House of Representatives of the Federation, which is equally divided between Bosniacs and Croats, two by the Assembly of Republika Srpska and three selected by the President of the European Court of Human Rights after consultation with the Presidency which consists of one elected Bosniac and one elected Croat from the Federation and one Serb directly elected from Republika Srpska.

The Constitutional Court has appellate jurisdiction over issues under the Constitution arising out of a judgment of any other court in Bosnia and Herzegovina which includes both Entities.

Article II of the Constitution is entitled Human Rights and Fundamental Freedoms. Section I, Human Rights, requires the highest level of ensurance of internationally recognized human rights. Section 2 provides the European Convention for the Protection of Human Rights and its Protocols shall apply directly and shall have priority over all other law. Among many relevant provisions of the Convention

and its Protocols is Article 13 of the Convention:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Section 3 enumerates rights of all persons within Bosnia and Herzegovina in a list running from (a) the right to life to, (m) the right to liberty of movement. Paragraph (e) guarantees the right to a fair hearing in civil and criminal matters.

The Constitutional Court also has jurisdiction over issues referred by any court in the territory concerning whether a law is compatible with the Constitution, with the European Convention for Human Rights and its protocols or concerning the existence of or the scope of a general rule of public international law pertinent to a court decision. See ABA Journal, Vol. 82, March 1996 at pp. 52-64 for a group of articles on the Constitutional Court and related law issues in Bosnia and Herzegovina.

U.S and other military leaders assigned to former Yugoslavia during its conflict have warned against "the uninformed notion that this is a war of good versus evil, of aggression against the aggrieved." Making Peace with the Guilty, Foreign Affairs, September/October 1995, pp. 22-39, by General Charles G. Boyd, Deputy Commander in Chief, U.S. European Command from 1992 to July 1995. He writes:

> "All factions in the former Yugoslavia have pursued the same objective -- avoiding minority status in Yugoslavia or any successor state -- and all have used the tools most readily available to achieve that end (p. 24)... I have flown over Bosnian villages and seen the results, not of combat, but of ethnically based criminal violence, homes within a village selectively and systematically

> destroyed as the majority population -- Muslim, Serb or Croat -- cleansed its community of now unwanted minorities (p. 26)... the Serb population in Bosnia may be only about half of its pre-war total (p. 29)."

The hope for peace requires the people involved to face the issues of redress for such wrongs through their own institutions. More than providing the only convenient court, the Constitutional Court alone can serve the greater ends of truth and justice by seeking reconciliation and fairness among the people of Bosnia and Herzegovina through their own people and institutions.

Whether, as all must hope, the Constitution succeeds, it reflects an international diplomatic determination to secure peace and protect human rights in Bosnia and Herzegovina and former Yugoslavia. The territory adopting this Constitution is the best, and in the most basic sense the only place peace and protection of rights can be secured. It should be given the chance to determine rights and justice among its own people. If this Constitution fails, judgments from distant jurisdictions will have little chance for enforcement by a system of law in Bosnia and Herzegovina.

The Agreement for Peace in Bosnia and Herzegovina demonstrates the risks and costs of finding these cases justiciable in the U.S. and strongly supports dismissal here as forum non conveniens.

The summary disposition by the Court of Appeals of the applicability of the doctrine of forum non conveniens stressed by the United States as important in a case with so little contact with the U.S. and urgently requiring consideration reveals an appetite in some courts for such litigation. The Court of Appeals observed no party had identified a more suitable forum, "and we are aware of none." A39. It concluded erroneously and without submissions by the parties that "it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available... even if

circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum." Id.

Courts were open for both criminal and civil proceedings within the areas involved at all times. Since the Dayton Accords in December 1996, jurisdiction within what might now be called former Bosnia has been generally agreed upon as among Croatian and Muslim areas in the Federation of Bosnia and Herzegovina and the new Serb Republika Srpska. Plaintiffs' preference for a United States forum is only the preference of plaintiffs' counsel for a forum where they live and can wield greatest influence in the international political struggle over the failure of former Yugoslavia.

The need for resolution of the scope and application of the Alien Tort Act is urgent. The international community is aware of the expanding jurisdictional reach being claimed by U.S. law and courts, particularly from this very case. Pendency of the cases is a consideration in diplomatic concerns in the region, second to pendency of investigations and indictments by the International Tribunal for the Former Yugoslavia. Both proceedings can affect relations among nations in the region and the United States, as well as internal political decisions throughout former Yugoslavia.

It is important to review these issues now before entering into the bramble bushes of further litigation presented by these cases. Although the judgments below are interlocutory, the issues are fully ripe for review on the basis of the great body of lower court decisions including the careful, detailed and we submit correct analysis of the District Court and the extensive opinion of the Court of Appeals. The parties, courts and the foreign policy interests of the U.S., should not be forced to face the enormous burdens and imponderables of litigation before these clear and important issues are finally and authoritatively resolved.

Interlocutory review is appropriate because this case

presents important and clear-cut issues of law that are fundamental to the further conduct of the case and that otherwise meet the criteria for qualifying as a basis for certiorari. See U.S. v. General Motors Corp., 323 U.S. 373, 377 (1945); Land v. Dollar, 330 U.S. 731, 734 n. 2 (1947); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 685 n. 3 (1949).

Exile and interest groups in the United States supporting governments and factions in areas of armed struggle around the world are seeking litigation opportunities here that address conflicts overseas. The cases opening U.S. courts to such litigation have developed radically new law without Supreme Court guidance for over two decades. The law is at critical stage. This case is the most far reaching statement of this claimed worldwide tort jurisdiction. This case, because of its prominence and relation to important history, cannot escape attention. The need for resolution now is crucial.

III. The Decision Below Violates Established Law And A Treaty Creating Immunity Necessary To Protect Essential Functions Of The United Nations

The common law has long exempted from service of process and personal jurisdiction a non-resident who comes into a jurisdiction to participate as a party or witness in judicial proceedings in order to protect governmental proceedings from undue interference.

Although the exemption has most often been applied to participation in judicial proceedings it has much wider application as described in Durst v. Tautges, Wilder & McDonald, 44 F.2d 507, 509 (7th Cir. 1930). See also, Filer v. McCormick, 260 Fed. 309 (N.D.Calif. 1919)(exemption applied to a non-resident bank president attending an emergency conference to raise money for the U.S. in World War I); Pavlo v. James, 437 F.Supp. 125 (S.D.N.Y. 1977)(attendance at arbitration proceedings); Chase National Bank v. Turner, 269

N.Y. 397 (1936)(client's attendance as observer at an appeal); Youpe v. Strasser, 113 F.Supp 289 (D.D.C. 1953), appeal dismissed sub nom. Youpe v. Moses, 213 F.2d 613 (D.C.Cir. 1954)(the appearance of a witness at a hearing before an administrative official, and a witness before a Committee of Congress).

The U.S. Court of Appeals for the District of Columbia has provided broad immunity from service of process and personal jurisdiction for persons coming to the nation's capital for "government contacts." See, Naartex Consulting Corp. v. Watt, 722 F.2d 779 (D.C.Cir. 1983), cert. denied, 467 U.S. 1210 (1984). See e.g. Sullivan v. Tagliabue, 785 F.Supp 1076, 1080-81 (D.R.I. 1992) and Nicols v. G.D. Searle & Co., 783 F.Supp. 233, 242-43 (D.Md. 1992), aff'd, 991 F.2d 1195 (4th Cir. 1993), for application of the government contacts exception outside the District of Columbia.

The Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, reprinted at 22 U.S.C. §287 note (1988)(Headquarters Agreement) though entered into in the early years of the U.N. before the scope of immunity required to protect U.N. functions was clear has been held to protect U.N. invitees. See §9(a), 11, 15.

Neither the parties, nor the Court below obtained the views of the United Nations on the immunity question. However, the U.N. Legal Advisor, Carl-August Fleischhauer who is now on the International Court of Justice at the Hague provided a letter for the record in Klinghoffer, dated June 11, 1986, attached to petitioner's rehearing petition below, which considered the immunity of a non-U.N. member, non-recognized government invited to establish a Permanent Observer Mission at the U.N.

Furthermore, since the permanent presence of the Palestine Liberation Organization in New York is a direct result of

> General Assembly resolution 3237 and is restricted to United Nations matters, that presence could appropriately be considered as not covering the receipt of service of legal process both personally and in rem in regard to matters completely unrelated to that presence.

In an important District Court decision which the United States did not appeal despite its denial of relief sought, closure of the PLO Observer Mission to the U.N., by the unanimous Congressional enactment of the Anti Terrorism Act of 1987, 22 U.S.C. §§5201-5203, Judge Palmieri wrote:

> Thus the language, application and interpretation of the Headquarters Agreement lead us to the conclusion that it requires the United States to refrain from interference with the PLO Observer Mission in the discharge of its functions at the United Nations.

U.S. v. PLO, 695 F.Supp 1456 at 1468 (S.D.N.Y. 1988).

The decision of the Court of Appeals in this case is in direct conflict with Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991). The Klinghoffer plaintiffs were U.S. citizens and residents of Manhattan. The Court first observed that except for its U.N. invitation, the defendant would not be entitled to enter the U.S. at all, as is true here. It then held, "and more importantly," that the U.N. could not function without such immunity for its invitees.

Klinghoffer recognized a necessary functional immunity for the Palestine Liberation Organization from personal jurisdiction because of its work as an invitee at the U.N. It held that "basing jurisdiction on the PLO's participation in U.N.-related activities would put an undue burden on the ability of foreign organizations to participate in the U.N.'s affairs." Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 51 (2d Cir. 1991).

The decision below will seriously impair the ability of the U.N. to function at its headquarters in New York. It is particularly harmful because immunity was denied to an essential participant in critical peace negotiations in the very conflict in which plaintiffs' injuries are alleged to have occurred. That participant, your petitioner, was urgently requested to attend the peace negotiations in New York to be available to Security Council members. This Court should recognize that United Nations participants have at least the immunity granted participants in federal, state and local proceedings.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, N.Y.
April 3, 1996

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1541, 1544—August Term 1994

Argued: June 20, 1995 Decided: October 13, 1995

Docket Nos. 94-9035, -9069

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all other similarly situated,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADZIC,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and WALKER, *Circuit Judges*.

Appeals from the judgment entered September 19, 1994, in the Southern District of New York (Peter K. Leisure, Judge) dismissing, for lack of subject matter jurisdiction, two lawsuits by victims of atrocities allegedly committed in Bosnia by the Bosnian-Serb leader, Radovan Karadžić. *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994).

Judgment reversed and cases remanded.

BETH STEPHENS, New York, N.Y. (Matthew J. Chachère, Jennifer Green, Peter Weiss, Michael Ratner, Jules Lobel, Center for Constitutional Rights, New York, N.Y.; Rhonda Copelon, Celina Romany, International Women's Human Rights Clinic, Flushing, N.Y.; Judith Levin, International League of Human Rights, New York, N.Y.; Harold Hongju Koh, Ronald C. Slye, Swati Agrawal, Bruce Brown,

Charlotte Burrows, Carl Goldfarb, Linda Keller, Jon Levitsky, Daniyal Mueenuddin, Steve Parker, Maxwell S. Peltz, Amy Valley, Wendy Weiser, Allard K. Lowenstein International Human Rights Clinic, New Haven, Conn., on the brief), *for plaintiffs-appellants, Jane Doe I and Jane Doe II.*

CATHARINE A. MACKINNON, Ann Arbor, Mich. (Martha F. Davis, Deborah A. Ellis, Yolanda S. Wu, NOW Legal Defense and Education Fund, New York, N.Y., on the brief), *for plaintiffs-appellants Kadic, Internationalna Iniciativa Zena Bosne I Hercegovine, and Zena Bosne I Hercegovine.*

RAMSEY CLARK, New York, N.Y. (Lawrence W. Schilling, New York, N.Y., on the brief), *for defendant-appellee.*

(Drew S. Days, III, Solicitor General, and Conrad K. Harper, Legal Adviser, Department of State, Washington, D.C., submitted a Statement of Interest of the United States; Frank W. Hunger, Asst. Atty. Gen., and Douglas Letter, Appellate Litigation Counsel, on the brief).

(Karen Honeycut, Vladeck, Waldman, Elias & Engelhard, New York, N.Y., submitted a brief for *amici curiae* Law Professors Frederick M. Abbott, et al.).

(Nancy Kelly, Women Refugee Project, Harvard Immigration and Refugee Program,

Cambridge and Somerville Legal Services, Cambridge, Mass., submitted a brief for *amici curiae* Alliances—an African Women's Network, et al.).

(Juan E. Mendez, Joanne Mariner, Washington, D.C.; Professor Ralph G. Steinhardt, George Washington University School of Law, Washington, D.C.; Paul L. Hoffman, Santa Monica, Cal.; Professor Joan Fitzpatrick, University of Washington School of Law, Seattle, Wash., submitted a brief for *amicus curiae* Human Rights Watch.

(Stephen M. Schneebaum, Washington, D.C., submitted a brief for *amici curiae* The International Human Rights Law Group, et al.).

JON O. NEWMAN, *Chief Judge*:

Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations. The pending appeals pose

additional significant issues as to the scope of the Alien Tort Act: whether some violations of the law of nations may be remedied when committed by those not acting under the authority of a state; if so, whether genocide, war crimes, and crimes against humanity are among the violations that do not require state action; and whether a person, otherwise liable for a violation of the law of nations, is immune from service of process because he is present in the United States as an invitee of the United Nations.

These issues arise on appeals by two groups of plaintiffs-appellants from the November 19, 1994, judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, Judge), dismissing, for lack of subject matter jurisdiction, their suits against defendant-appellee Radovan Karadžić, President of the self-proclaimed Bosnian-Serb republic of "Srpska." *Doe v. Karadžić*, 866 F. Supp. 734 (S.D.N.Y. 1994) ("*Doe*"). For reasons set forth below, we hold that subject matter jurisdiction exists, that Karadžić may be found liable for genocide, war crimes, and crimes against humanity in his private capacity and for other violations in his capacity as a state actor, and that he is not immune from service of process. We therefore reverse and remand.

Background

The plaintiffs-appellants are Croat and Muslim citizens of the internationally recognized nation of Bosnia-Herzegovina, formerly a republic of Yugoslavia. Their complaints, which we accept as true for purposes of this appeal, allege that they are victims, and representatives of victims, of various atrocities, including brutal acts of rape, forced prostitution, forced impregnation, torture,

and summary execution, carried out by Bosnian-Serb military forces as part of a genocidal campaign conducted in the course of the Bosnian civil war. Karadžić, formerly a citizen of Yugoslavia and now a citizen of Bosnia-Herzegovina, is the President of a three-man presidency of the self-proclaimed Bosnian-Serb republic within Bosnia-Herzegovina, sometimes referred to as "Srpska," which claims to exercise lawful authority, and does in fact exercise actual control, over large parts of the territory of Bosnia-Herzegovina. In his capacity as President, Karadžić possesses ultimate command authority over the Bosnian-Serb military forces, and the injuries perpetrated upon plaintiffs were committed as part of a pattern of systematic human rights violations that was directed by Karadžić and carried out by the military forces under his command. The complaints allege that Karadžić acted in an official capacity either as the titular head of Srpska or in collaboration with the government of the recognized nation of the former Yugoslavia and its dominant constituent republic, Serbia.

The two groups of plaintiffs asserted causes of action for genocide, rape, forced prostitution and impregnation, torture and other cruel, inhuman, and degrading treatment, assault and battery, sex and ethnic inequality, summary execution, and wrongful death. They sought compensatory and punitive damages, attorney's fees, and, in one of the cases, injunctive relief. Plaintiffs grounded subject-matter jurisdiction in the Alien Tort Act, the Torture Victim Protection Act of 1991 ("Torture Victim Act"), Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (Supp. V 1993), the general federal-question jurisdictional statute, 28 U.S.C. § 1331 (1988), and principles of supplemental jurisdiction, 28 U.S.C. § 1367 (Supp. V 1993).

In early 1993, Karadžić was admitted to the United States on three separate occasions as an invitee of the United Nations. According to affidavits submitted by the plaintiffs, Karadžić was personally served with the summons and complaint in each action during two of these visits while he was physically present in Manhattan. Karadžić admits that he received the summons and complaint in the *Kadic* action, but disputes whether the attempt to serve him personally in the *Doe* action was effective.

In the District Court, Karadžić moved for dismissal of both actions on the grounds of insufficient service of process, lack of personal jurisdiction, lack of subject-matter jurisdiction, and nonjusticiability of plaintiffs' claims. However, Karadžić submitted a memorandum of law and supporting papers only on the issues of service of process and personal jurisdiction, while reserving the issues of subject-matter jurisdiction and nonjusticiability for further briefing, if necessary. The plaintiffs submitted papers responding only to the issues raised by the defendant.

Without notice or a hearing, the District Court bypassed the issues briefed by the parties and dismissed both actions for lack of subject-matter jurisdiction. In an Opinion and Order, reported at 866 F. Supp. 734, the District Judge preliminarily noted that the Court might be deprived of jurisdiction if the Executive Branch were to recognize Karadžić as the head of state of a friendly nation, *see Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994) (head-of-state immunity), and that this possibility could render the plaintiffs' pending claims requests for an advisory opinion. The District Judge recognized that this consideration was not dis-

positive but believed that it "militates against this Court exercising jurisdiction." *Doe*, 866 F. Supp. at 738.

Turning to the issue of subject-matter jurisdiction under the Alien Tort Act, the Court concluded that "acts committed by non-state actors do not violate the law of nations," *id.* at 739. Finding that "[t]he current Bosnian-Serb warring military faction does not constitute a recognized state," *id.* at 741 and that "the members of Karadžić's faction do not act under the color of any recognized state law," *id.*, the Court concluded that "the acts alleged in the instant action[s], while grossly repugnant, cannot be remedied through [the Alien Tort Act]," *id.* at 740-41. The Court did not consider the plaintiffs' alternative claim that Karadžić acted under color of law by acting in concert with the Serbian Republic of the former Yugoslavia, a recognized nation.

The District Judge also found that the apparent absence of state action barred plaintiffs' claim under the Torture Victim Act, which expressly requires that an individual defendant act "under actual or apparent authority, or color of law, of any foreign nation," Torture Victim Act § 2(a). With respect to plaintiffs' further claim that the law of nations, as incorporated into federal common law, gives rise to an implied cause of action over which the Court would have jurisdiction pursuant to section 1331, the Judge found that the law of nations does not give rise to implied rights of action absent specific Congressional authorization, and that, in any event, such an implied right of action would not lie in the absence of state action. Finally, having dismissed all of plaintiffs' federal claims, the Court declined to exercise supplemental jurisdiction over their state-law claims.

Discussion

Though the District Court dismissed for lack of subject matter jurisdiction, the parties have briefed not only that issue but also the threshold issues of personal jurisdiction and justiciability under the political question doctrine. Karadžić urges us to affirm on any one of these three grounds. We consider each in turn.

I. Subject-Matter Jurisdiction

Appellants allege three statutory bases for the subject matter jurisdiction of the District Court—the Alien Tort Act, the Torture Victim Act, and the general federal-question jurisdictional statute.

A. The Alien Tort Act

1. General Application to Appellants' Claims

The Alien Tort Act provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350 (1988). Our decision in *Filártiga* established that this statute confers federal subject-matter jurisdiction when the following three conditions are satisfied: (1) an alien sues (2) for a tort (3) committed in violation of the law of nations (*i.e.*, international law).[1] *Id.* at 887; *see also Amerada Hess Shipping Corp. v.*

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[1] *Filártiga* did not consider the alternative prong of the Alien Tort Act: suits by aliens for a tort committed in violation of "a treaty of the United States." *See id.* at 880. As in *Filártiga*, plaintiffs in the instant cases "primarily rely upon treaties and other international instruments as evidence of an emerging norm of customary international law, rather th[a]n independent sources of law," *id.* at 880 n.7.

Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989). The first two requirements are plainly satisfied here, and the only disputed issue is whether plaintiffs have pleaded violations of international law.

Because the Alien Tort Act requires that plaintiffs plead a "violation of the law of nations" at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible "arising under" formula of section 1331. *See Filártiga*, 630 F.2d at 887-88. Thus, it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States).

Filártiga established that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881; *see also Amerada Hess*, 830 F.2d at 425. We find the norms of contemporary international law by " 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " *Filártiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). If this inquiry discloses that the defendant's alleged conduct violates "well-established, universally recognized norms of international law," *id.* at 888, as opposed to "idiosyncratic legal rules," *id.* at 881, then federal jurisdiction exists under the Alien Tort Act.

Karadžić contends that appellants have not alleged violations of the norms of international law because such norms bind only states and persons acting under color of a state's law, not private individuals. In making this contention, Karadžić advances the contradictory positions that he is not a state actor, *see* Brief for Appellee at 19, even as he asserts that he is the President of the self-proclaimed Republic of Srpska, *see* statement of Radovan Karadžić, May 3, 1993, submitted with Defendant's Motion to Dismiss. For their part, the Kadic appellants also take somewhat inconsistent positions in pleading defendant's role as President of Srpska, Kadic Complaint ¶ 13, and also contending that "Karadžić is not an official of any government," Kadic Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 21 n.25.

Judge Leisure accepted Karadžić's contention that "acts committed by non-state actors do not violate the law of nations," *Doe*, 866 F. Supp. at 739, and considered him to be a non-state actor.[2] The Judge appears to

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[2] Two passages of the District Court's opinion arguably indicate that Judge Leisure found the pleading of a violation of the law of nations inadequate because Srpska, even if a state, is not a state "recognized" by other nations. "The current Bosnian-Serb warring military faction does not constitute a recognized state . . . ." *Doe*, 866 F. Supp. at 741; "[t]he Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)]," *id.* However, the opinion, read as a whole, makes clear that the Judge believed that Srpska is not a state and was not relying on lack of recognition by other states. *See, e.g., id.* at 741 n.12 ("The Second Circuit has limited the definition of 'state' to 'entities that have a defined [territory] and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other entities.' *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991) (quotation, brackets and citation omitted). The current Bosnian-Serb entity fails to meet this definition." We quote Judge

have deemed state action required primarily on the basis of cases determining the need for state action as to claims of official torture, *see, e.g., Carmichael v. United Technologies Corp.*, 835 F.2d 109 (5th Cir. 1988), without consideration of the substantial body of law, discussed below, that renders private individuals liable for some international law violations.

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals. An early example of the application of the law of nations to the acts of private individuals is the prohibition against piracy. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *United States v. Furlong*, 18 U.S. (5 Wheat.) 184, 196-97 (1820). In *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844), the Supreme Court observed that pirates were "*hostis humani generis*" (an enemy of all mankind) in part because they acted "without . . . any pretense of public authority." *See generally* 4 William Blackstone, *Commentaries on the Laws of England* 68 (facsimile of 1st ed. 1765-1769, Univ. of Chi., ed. 1979). Later examples are prohibitions against the slave trade and certain war crimes. *See* M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* 193 (1992); Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 Harv. Hum. Rts. J. 51 (1992).

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early

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Leisure's quotation from *Klinghoffer* with the word "territory," which was inadvertently omitted.

recognized by the Executive Branch in an opinion of Attorney General Bradford in reference to acts of American citizens aiding the French fleet to plunder British property off the coast of Sierra Leone in 1795. *See Breach of Neutrality*, 1 Op. Att'y Gen. 57, 59 (1795). The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law. *See Statement of Interest of the United States* at 5-13.

The Restatement (Third) of the Foreign Relations Law of the United States (1986) ("*Restatement (Third)*") proclaims: "Individuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide." *Restatement (Third)* pt. II, introductory note. The Restatement is careful to identify those violations that are actionable when committed by a state, *Restatement (Third)* § 702,[3] and a more limited category of violations of "universal concern," *id.* § 404,[4] partially

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[3] Section 702 provides:

> A state violates international law if, as a matter of state policy, it practices, encourages, or condones
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> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention,
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.

[4] Section 404 provides:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of

overlapping with those listed in section 702. Though the immediate focus of section 404 is to identify those offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders, *cf. id.* § 402(1)(a), (2), the inclusion of piracy and slave trade from an earlier era and aircraft hijacking from the modern era demonstrates that the offenses of "universal concern" include those capable of being committed by non-state actors. Although the jurisdiction authorized by section 404 is usually exercised by application of criminal law, international law also permits states to establish appropriate civil remedies, *id.* § 404 cmt. b, such as the tort actions authorized by the Alien Tort Act. Indeed, the two cases invoking the Alien Tort Act prior to *Filártiga* both applied the civil remedy to private action. *See Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607).

Karadžić disputes the application of the law of nations to any violations committed by private individuals, relying on *Filártiga* and the concurring opinion of Judge Edwards in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).[5] *Filártiga* involved an allegation of torture committed by a state official. Relying on the United Nations' Declaration on the Protection of All Persons from Being

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aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present.

[5] Judge Edwards was the only member of the *Tel-Oren* panel to confront the issue whether the law of nations applies to non-state actors. Then-Judge Bork, relying on separation of powers principles, concluded, in disagreement with *Filártiga*, that the Alien Tort Act did not apply to most violations of the law of nations. *Tel-Oren*, 726 F.2d at 798. Judge Robb concluded that the controversy was non-justiciable. *Id.* at 823.

Subjected to Torture, G.A. Res. 3452, U.N. GAOR, U.N. Doc. A/1034 (1975) (hereinafter "Declaration on Torture"), as a definitive statement of norms of customary international law prohibiting states from permitting torture, we ruled that "*official* torture is now prohibited by the law of nations." *Filártiga*, 630 F.2d at 884 (emphasis added). We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filártiga* purports to preclude such a result.

Nor did Judge Edwards in his scholarly opinion in *Tel-Oren* reject the application of international law to any private action. On the contrary, citing piracy and slave-trading as early examples, he observed that there exists a "handful of crimes to which the law of nations attributes individual responsibility," *id.* at 795. Reviewing authorities similar to those consulted in *Filártiga*, he merely concluded that torture—the specific violation alleged in *Tel-Oren*—was not within the limited category of violations that do not require state action.

Karadžić also contends that Congress intended the state-action requirement of the Torture Victim Act to apply to actions under the Alien Tort Act. We disagree. Congress enacted the Torture Victim Act to codify the cause of action recognized by this Circuit in *Filártiga*, and to further extend that cause of action to plaintiffs who are U.S. citizens. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86 (explaining that codification of *Filártiga* was necessary in light of skepticism expressed by Judge Bork's concurring opinion in *Tel-Oren*). At the same time, Congress indicated that the Alien Tort Act "has other important uses and should not be replaced," because

> claims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

Id. The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.

2. Specific Application of Alien Tort Act to Appellants' Claims

In order to determine whether the offenses alleged by the appellants in this litigation are violations of the law of nations that may be the subject of Alien Tort Act claims against a private individual, we must make a particularized examination of these offenses, mindful of the important precept that "evolving standards of international law govern who is within the [Alien Tort Act's] jurisdictional grant." *Amerada Hess*, 830 F.2d at 425. In making that inquiry, it will be helpful to group the appellants' claims into three categories: (a) genocide, (b) war crimes, and (c) other instances of inflicting death, torture, and degrading treatment.

(a) *Genocide*. In the aftermath of the atrocities committed during the Second World War, the condemnation of genocide as contrary to international law quickly achieved broad acceptance by the community of nations. In 1946, the General Assembly of the United Nations declared that genocide is a crime under international law that is condemned by the civilized world, whether the perpetrators are "private individuals, public officials or statesmen." G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-89 (1946). The General Assembly

also affirmed the principles of Article 6 of the Agreement and Charter Establishing the Nuremberg War Crimes Tribunal for punishing " 'persecutions on political, racial, or religious grounds,' " regardless of whether the offenders acted " 'as individuals or as members of organizations,' " *In re Extradition of Demjanjuk*, 612 F. Supp. 544, 555 n.11 (N.D. Ohio) (quoting Article 6). *See* G.A. Res. 95(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188 (1946).

The Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, *entered into force* Jan. 12, 1951, *for the United States* Feb. 23, 1989 (hereinafter "Convention on Genocide"), provides a more specific articulation of the prohibition of genocide in international law. The Convention, which has been ratified by more than 120 nations, including the United States, *see* U.S. Dept. of State, *Treaties in Force* 345 (1994), defines "genocide" to mean

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
>
> (b) Causing serious bodily or mental harm to members of the group;
>
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> (d) Imposing measures intended to prevent births with the group;
>
> (e) Forcibly transferring children of the group to another group.

Convention on Genocide art. II. Especially pertinent to the pending appeal, the Convention makes clear that "[p]ersons committing genocide . . . shall be punished, *whether they are constitutionally responsible rulers, public officials or private individuals.*" *Id.* art. IV (emphasis added). These authorities unambiguously reflect that, from its incorporation into international law, the proscription of genocide has applied equally to state and non-state actors.

The applicability of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1988), which criminalizes acts of genocide without regard to whether the offender is acting under color of law, *see id.* § 1091(a) ("[w]hoever" commits genocide shall be punished), if the crime is committed within the United States or by a U.S. national, *id.* § 1091(d). Though Congress provided that the Genocide Convention Implementation Act shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding," *id.* § 1092, the legislative decision not to create a new private remedy does not imply that a private remedy is not already available under the Alien Tort Act. Nothing in the Genocide Convention Implementation Act or its legislative history reveals an intent by Congress to repeal the Alien Tort Act insofar as it applies to genocide,[6] and the two

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[6] The Senate Report merely repeats the language of section 1092 and does not provide any explanation of its purpose. *See* S. Rep. 333, 100th Cong., 2d Sess., at 5 (1988), *reprinted at* 1988 U.S.C.C.A.N. 4156, 4160. The House Report explains that section 1092 "clarifies that the bill creates no *new* federal cause of action in civil proceedings." H.R. Rep. 566, 100th Cong., 2d Sess., at 8 (1988) (emphasis added). This explanation confirms our view that the Genocide Convention Implementation

statutes are surely not repugnant to each other. Under these circumstances, it would be improper to construe the Genocide Convention Implementation Act as repealing the Alien Tort Act by implication. *See Rodriguez v. United States*, 480 U.S. 522, 524 (1987) ("[R]epeals by implication are not favored and will not be found unless an intent to repeal is clear and manifest.") (citations and internal quotation marks omitted); *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir.) ("mutual exclusivity" of statutes is required to demonstrate Congress's "clear, affirmative intent to repeal"), *cert. denied*, 500 U.S. 941 (1991).

Appellants' allegations that Karadžić personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats clearly state a violation of the international law norm proscribing genocide, regardless of whether Karadžić acted under color of law or as a private individual. The District Court has subject-matter jurisdiction over these claims pursuant to the Alien Tort Act.

(b) *War crimes*. Plaintiffs also contend that the acts of murder, rape, torture, and arbitrary detention of civilians, committed in the course of hostilities, violate the law of war. Atrocities of the types alleged here have long been recognized in international law as violations of the law of war. *See In re Yamashita*, 327 U.S. 1, 14 (1946). Moreover, international law imposes an affirmative duty on military commanders to take appropriate

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Act was not intended to abrogate civil causes of action that might be available under *existing* laws, such as the Alien Tort Act.

measures within their power to control troops under their command for the prevention of such atrocities. *Id.* at 15-16.

After the Second World War, the law of war was codified in the four Geneva Conventions,[7] which have been ratified by more than 180 nations, including the United States, *see Treaties in Force*, *supra*, 398-99. Common article 3, which is substantially identical in each of the four Conventions, applies to "armed conflict[s] not of an international character" and binds "each Party to the conflict . . . to apply, as a minimum, the following provisions":

> Persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

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[7] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31 (hereinafter "Geneva Convention I"); Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.T.S. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court . . . .

Geneva Convention I art. 3(1). Thus, under the law of war as codified in the Geneva Conventions, all "parties" to a conflict—which includes insurgent military groups—are obliged to adhere to these most fundamental requirements of the law of war.[8]

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[8] Appellants also maintain that the forces under Karadžić's command are bound by the Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, 16 I.L.M. 1442 (1977) ("Protocol II"), which has been signed but not ratified by the United States, *see* International Committee of the Red Cross: *Status of Four Geneva Conventions and Additional Protocols I and II*, 30 I.L.M. 397 (1991). Protocol II supplements the fundamental requirements of common article 3 for armed conflicts that "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* art. 1. In addition, plaintiffs argue that the forces under Karadžić's command are bound by the remaining provisions of the Geneva Conventions, which govern international conflicts, *see* Geneva Convention I art. 2, because the self-proclaimed Bosnian-Serb republic is a nation that is at war with Bosnia-Herzegovina or, alternatively, the Bosnian-Serbs are an insurgent group in a civil war who have attained the status of "belligerents," and to whom the rules governing international wars therefore apply.

At this stage in the proceedings, however, it is unnecessary for us to decide whether the requirements of Protocol II have ripened into

The offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in common article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents. The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, *see* Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 Int'l Conciliation 304 (April 1949) (collecting cases), and remains today an important aspect of international law, *see* Jordan Paust, *After My Lai: The Case for War Crimes Jurisdiction Over Civilians in Federal District Courts*, in 4 The Vietnam War and International Law 447 (R. Falk ed. 1976). The District Court has jurisdiction pursuant to the Alien Tort Act over appellants' claims of war crimes and other violations of international humanitarian law.

(c) *Torture and summary execution.* In *Filártiga*, we held that *official* torture is prohibited by universally accepted norms of international law, *see* 630 F.2d at 885, and the Torture Victim Act confirms this holding and extends it to cover summary execution. Torture Victim Act §§ 2(a), 3(a). However, torture and summary execution—when not perpetrated in the course of genocide or war crimes—are proscribed by international law only when committed by state officials or under color of law. *See* Declaration on Torture art. 1 (defining torture as being "inflicted by or at the instigation of a public official"); Convention Against Torture and Other Cruel,

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universally accepted norms of international law, or whether the provisions of the Geneva Conventions applicable to international conflicts apply to the Bosnian-Serb forces on either theory advanced by plaintiffs.

Inhuman, or Degrading Treatment or Punishment pt. I, art. 1, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985), *entered into force* June 26, 1987, *ratified by United States* Oct. 21, 1994, 34 I.L.M. 590, 591 (1995) (defining torture as "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity"); Torture Victim Act § 2(a) (imposing liability on individuals acting "under actual or apparent authority, or color of law, of any foreign nation").

In the present case, appellants allege that acts of rape, torture, and summary execution were committed during hostilities by troops under Karadžić's command and with the specific intent of destroying appellants' ethnic-religious groups. Thus, many of the alleged atrocities are already encompassed within the appellants' claims of genocide and war crimes. Of course, at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes. It suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes, and otherwise may be pursued against Karadžić to the extent that he is shown to be a state actor. Since the meaning of the state action requirement for purposes of international law violations will likely arise on remand and has already been considered by the District Court, we turn next to that requirement.

3. The State Action Requirement for International Law Violations

In dismissing plaintiffs' complaints for lack of subject-matter jurisdiction, the District Court concluded that the alleged violations required state action and that the "Bosnian-Serb entity" headed by Karadžić does not meet the definition of a state. *Doe*, 866 F. Supp. at 741 n.12. Appellants contend that they are entitled to prove that Srpska satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadžić acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.

(a) *Definition of a state in international law.* The definition of a state is well established in international law:

> Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.

Restatement (Third) § 201; *accord Klinghoffer*, 937 F.2d at 47; *National Petrochemical*, 860 F.2d at 553; *see also Texas v. White*, 74 U.S. (7 Wall.) 700, 720 (1868). "[A]ny government, however violent and wrongful in its origin, must be considered a de facto government if it was in the full and actual exercise of sovereignty over a territory and people large enough for a nation." *Ford v. Surget*, 97 U.S. (7 Otto) 594, 620 (1878) (Clifford, J., concurring).

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with

other states, it does not require recognition by other states. *See Restatement (Third)* § 202 cmt. b ("An entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states.' Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, *see, e.g., Pfizer Inc. v. India*, 434 U.S. 308, 318-20 (1978) (diversity jurisdiction); *Sabbatino*, 376 U.S. at 408-12 (access to U.S. courts); *Lafontant*, 844 F. Supp. at 131 (head-of-state immunity), but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the "state" action of unrecognized states. *See, e.g., United States v. Insurance Cos.*, 89 U.S. (22 Wall.) 99, 101-03 (1875) (seceding states in Civil War); *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 9-12 (1869) (same); *Carl Zeiss Stiftung v. VEB Carl Zeiss Jena*, 433 F.2d 686, 699 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971) (post-World War II East Germany).

The customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states. *See Restatement (Third)* §§ 207, 702. It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.

Appellants' allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state, for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have

entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like "official" torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.

(b) *Acting in concert with a foreign state.* Appellants also sufficiently alleged that Karadžić acted under color of law insofar as they claimed that he acted in concert with the former Yugoslavia, the statehood of which is not disputed. The "color of law" jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act. *See Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1546 (N.D. Cal. 1987), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988). A private individual acts under color of law within the meaning of section 1983 when he acts together with state officials or with significant state aid. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). The appellants are entitled to prove their allegations that Karadžić acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.

B. The Torture Victim Protection Act

The Torture Victim Act, enacted in 1992, provides a cause of action for official torture and extrajudicial killing:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

Torture Victim Act § 2(a). The statute also requires that a plaintiff exhaust adequate and available local remedies, *id.* § 2(b), imposes a ten-year statute of limitations, *id.* § 2(c), and defines the terms "extrajudicial killing" and "torture," *id.* § 3.

By its plain language, the Torture Victim Act renders liable only those individuals who have committed torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." Legislative history confirms that this language was intended to "make[ ] clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim," and that the statute "does not attempt to deal with torture or killing by purely private groups." H.R. Rep. No. 367, 102d Cong., 2d Sess., at 5 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 87. In construing the terms "actual or apparent authority" and "color of law," courts are instructed to look to principles of agency law and to jurisprudence under 28 U.S.C. § 1983, respectively. *Id.*

Though the Torture Victim Act creates a cause of action for official torture, this statute, unlike the Alien

Tort Act, is not itself a jurisdictional statute. The Torture Victim Act permits the appellants to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of section 1331, *see Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995), to which we now turn.

C. Section 1331

The appellants contend that section 1331 provides an independent basis for subject-matter jurisdiction over all claims alleging violations of international law. Relying on the settled proposition that federal common law incorporates international law, *see The Paquete Habana*, 175 U.S. 677, 700 (1900); *In re Estate of Ferdinand E. Marcos Human Rights Litigation* (*Marcos I*), 978 F.2d 493, 502 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2960 (1993); *Filártiga*, 630 F.2d at 886, they reason that causes of action for violations of international law "arise under" the laws of the United States for purposes of jurisdiction under section 1331. Whether that is so is an issue of some uncertainty that need not be decided in this case.

In *Tel-Oren* Judge Edwards expressed the view that section 1331 did not supply jurisdiction for claimed violations of international law unless the plaintiffs could point to a remedy granted by the law of nations or argue successfully that such a remedy is implied. *Tel-Oren*, 726 F.2d at 779-80 n.4. The law of nations generally does not create private causes of action to remedy its violations, but leaves to each nation the task of defining the remedies that are available for international law violations. *Id.* at 778 (Edwards, J., concurring). Some district courts, however, have upheld section 1331 juris-

diction for international law violations. *See Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *appeal argued*, No. 93-9133 (11th Cir. Jan. 10, 1995); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4-5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

We recognized the possibility of section 1331 jurisdiction in *Filártiga*, 630 F.2d at 887 n.22, but rested jurisdiction solely on the applicable Alien Tort Act. Since that Act appears to provide a remedy for the appellants' allegations of violations related to genocide, war crimes, and official torture, and the Torture Victim Act also appears to provide a remedy for their allegations of official torture, their causes of action are statutorily authorized, and, as in *Filártiga*, we need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.

II. Service of Process and Personal Jurisdiction

Appellants aver that Karadžić was personally served with process while he was physically present in the Southern District of New York. In the *Doe* action, the affidavits detail that on February 11, 1993, process servers approached Karadžić in the lobby of the Hotel Intercontinental at 111 East 48th St. in Manhattan, called his name and identified their purpose, and attempted to hand him the complaint from a distance of two feet, that security guards seized the complaint papers, and that the papers fell to the floor. Karadžić submitted an affidavit of a State Department security officer, who generally confirmed the episode, but stated that the process server did not come closer than six feet of the defendant. In the

Kadic action, the plaintiffs obtained from Judge Owen an order for alternate means of service, directing service by delivering the complaint to a member of defendant's State Department security detail, who was ordered to hand the complaint to the defendant. The security officer's affidavit states that he received the complaint and handed it to Karadžić outside the Russian Embassy in Manhattan. Karadžić's statement confirms that this occurred during his second visit to the United States, sometime between February 27 and March 8, 1993. Appellants also allege that during his visits to New York City, Karadžić stayed at hotels outside the "headquarters district" of the United Nations and engaged in non-United Nations-related activities such as fund-raising.

Fed. R. Civ. P. 4(e)(2) specifically authorizes personal service of a summons and complaint upon an individual physically present within a judicial district of the United States, and such personal service comports with the requirements of due process for the assertion of personal jurisdiction. *See Burnham v. Superior Court*, 495 U.S. 604 (1990).

Nevertheless, Karadžić maintains that his status as an invitee of the United Nations during his visits to the United States rendered him immune from service of process. He relies on both the Agreement Between the United Nations and the United States of America Regarding the Headquarters of the United Nations, *reprinted at* 22 U.S.C. § 287 note (1988) ("Headquarters Agreement"), and a claimed federal common law immunity. We reject both bases for immunity from service.

A. Headquarters Agreement

The Headquarters Agreement provides for immunity from suit only in narrowly defined circumstances. First, "service of legal process . . . may take place within the headquarters district only with the consent of and under conditions approved by the Secretary-General." *Id.* § 9(a). This provision is of no benefit to Karadžić, because he was not served within the well-defined confines of the "headquarters district," which is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street, *see id.* annex 1. Second, certain representatives of members of the United Nations, whether residing inside or outside of the "headquarters district," shall be entitled to the same privileges and immunities as the United States extends to accredited diplomatic envoys. *Id.* § 15. This provision is also of no benefit to Karadžić, since he is not a designated representative of any member of the United Nations.

A third provision of the Headquarters Agreement prohibits federal, state, and local authorities of the United States from "impos[ing] any impediments to transit to or from the headquarters district of . . . persons invited to the headquarters district by the United Nations . . . on official business." *Id.* § 11. Karadžić maintains that allowing service of process upon a United Nations invitee who is on official business would violate this section, presumably because it would impose a potential burden—exposure to suit—on the invitee's transit to and from the headquarters district. However, this Court has previously refused "to extend the immunities provided by the Headquarters Agreement beyond those explicitly stated." *See Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (2d Cir. 1991). We therefore reject Karadžić's proposed construction of section 11, because

it would effectively create an immunity from suit for United Nations invitees where none is provided by the express terms of the Headquarters Agreement.[9]

The parties to the Headquarters Agreement agree with our construction of it. In response to a letter from plaintiffs' attorneys opposing any grant of immunity to Karadžić, a responsible State Department official wrote: "Mr. Karadžić's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States." Letter from Michael J. Habib, Director of Eastern European Affairs, U.S. Dept. of State, to Beth Stephens (Mar. 24, 1993) ("Habib Letter"). Counsel for the United Nations has also issued an opinion stating that although the United States must allow United Nations invitees access to the Headquarters District, invitees are not immune from legal process while in the United State at locations outside of the Headquarters District. *See In re Galvao*, [1963] U.N. Jur. Y.B. 164 (opinion of U.N. legal counsel); *see also Restatement (Third)* § 469 reporter's note 8 (U.N. invitee "is not immune from suit or legal process outside the headquarters district during his sojourn in the United States").

B. Federal common law immunity

Karadžić nonetheless invites us to fashion a federal common law immunity for those within a judicial district as a United Nations invitee. He contends that such a rule

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[9] Conceivably, a narrow immunity from service of process might exist under section 11 for invitees who are in *direct* transit between an airport (or other point of entry into the United States) and the Headquarters District. Even if such a narrow immunity did exist—which we do not decide—Karadžić would not benefit from it since he was not served while traveling to or from the Headquarters District.

is necessary to prevent private litigants from inhibiting the United Nations in its ability to consult with invited visitors. Karadžić analogizes his proposed rule to the "government contacts exception" to the District of Columbia's long-arm statute, which has been broadly characterized to mean that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction," *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C. 1978); *see also Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785-87 (D.C. Cir. 1983) (construing government contacts exception to District of Columbia's long-arm statute), *cert. denied*, 467 U.S. 1210 (1984). He also points to a similar restriction upon assertion of personal jurisdiction on the basis of the presence of an individual who has entered a jurisdiction in order to attend court or otherwise engage in litigation. *See generally* 4 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1076 (2d ed. 1987).

Karadžić also endeavors to find support for a common law immunity in our decision in *Klinghoffer*. Though, as noted above, *Klinghoffer* declined to extend the immunities of the Headquarters Agreement beyond those provided by its express provisions, the decision applied immunity considerations to its construction of New York's long-arm statute, N.Y. Civ. Prac. L. & R. 301 (McKinney 1990), in deciding whether the Palestine Liberation Organization (PLO) was doing business in the state. *Klinghoffer* construed the concept of "doing business" to cover only those activities of the PLO that were not United Nations-related. *See* 937 F.2d at 51.

Despite the considerations that guided *Klinghoffer* in its narrowing construction of the general terminology of

New York's long-arm statute as applied to United Nations activities, we decline the invitation to create a federal common law immunity as an extension of the precise terms of a carefully crafted treaty that struck the balance between the interests of the United Nations and those of the United States.

Finally, we note that the mere possibility that Karadžić might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellants' claims into a nonjusticiable request for an advisory opinion, as the District Court intimated. Even if such future recognition, determined by the Executive Branch, *see Lafontant*, 844 F. Supp. at 133, would create head-of-state immunity, *but see In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (passage of Foreign Sovereign Immunities Act leaves scope of head-of-state immunity uncertain), it would be entirely inappropriate for a court to create the functional equivalent of such an immunity based on speculation about what the Executive Branch *might* do in the future. *See Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("[I]t is the duty of the courts, in a matter so intimately associated with our foreign policy . . ., not to enlarge an immunity to an extent which the government . . . has not seen fit to recognize.").

In sum, if appellants personally served Karadžić with the summons and complaint while he was in New York but outside of the U.N. headquarters district, as they are prepared to prove, he is subject to the personal jurisdiction of the District Court.

III. Justiciability

We recognize that cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations. We do not read *Filártiga* to mean that the federal judiciary must always act in ways that risk significant interference with United States foreign relations. To the contrary, we recognize that suits of this nature can present difficulties that implicate sensitive matters of diplomacy historically reserved to the jurisdiction of the political branches. *See First National Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972). We therefore proceed to consider whether, even though the jurisdictional threshold is satisfied in the pending cases, other considerations relevant to justiciability weigh against permitting the suits to proceed.

Two nonjurisdictional, prudential doctrines reflect the judiciary's concerns regarding separation of powers: the political question doctrine and the act of state doctrine. It is the " 'constitutional' underpinnings" of these doctrines that influenced the concurring opinions of Judge Robb and Judge Bork in *Tel-Oren*. Although we too recognize the potentially detrimental effects of judicial action in cases of this nature, we do not embrace the rather categorical views as to the inappropriateness of judicial action urged by Judges Robb and Bork. Not every case "touching foreign relations" is non-justiciable, *see Baker v. Carr*, 369 U.S. 186, 211 (1962); *Lamont v. Woods*, 948 F.2d 825, 831-32 (2d Cir. 1991), and judges should not reflexively invoke these doctrines to avoid difficult and somewhat sensitive decisions in the context of human rights. We believe a preferable approach is to weigh carefully the relevant considera-

tions on a case-by-case basis. This will permit the judiciary to act where appropriate in light of the express legislative mandate of the Congress in section 1350, without compromising the primacy of the political branches in foreign affairs.

Karadžić maintains that these suits were properly dismissed because they present nonjusticiable political questions. We disagree. Although these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions. "[T]he doctrine 'is one of "political questions," not one of "political cases." ' " *Klinghoffer*, 937 F.2d at 49 (quoting *Baker*, 369 U.S. at 217).

A nonjusticiable political question would ordinarily involve one or more of the following factors:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. at 217; *see also Can v. United States*, 14 F.3d 160, 163 (2d Cir. 1994). With respect to the first three factors, we have noted in a similar context

involving a tort suit against the PLO that "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49. Although the present actions are not based on the common law of torts, as was *Klinghoffer*, our decision in *Filártiga* established that universally recognized norms of international law provide judicially discoverable and manageable standards for adjudicating suits brought under the Alien Tort Act, which obviates any need to make initial policy decisions of the kind normally reserved for nonjudicial discretion. Moreover, the existence of judicially discoverable and manageable standards further undermines the claim such suits relate to matters that are constitutionally committed to another branch. *See Nixon v. United States*, 113 S. Ct. 732, 735 (1993).

The fourth through sixth *Baker* factors appear to be relevant only if judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests. Disputes implicating foreign policy concerns have the potential to raise political question issues, although, as the Supreme Court has wisely cautioned, "it is 'error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'" *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986) (quoting *Baker*, 369 U.S. at 211).

The act of state doctrine, under which courts generally refrain from judging the acts of a foreign state within its territory, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428; *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897), might be implicated in some cases arising

under section 1350. However, as in *Filártiga*, 630 F.2d at 889, we doubt that the acts of even a state official, taken in violation of a nation's fundamental law and wholly unratified by that nation's government, could properly be characterized as an act of state.

In the pending appeal, we need have no concern that interference with important governmental interests warrants rejection of appellants' claims. After commencing their action against Karadžić, attorneys for the plaintiffs in *Doe* wrote to the Secretary of State to oppose reported attempts by Karadžić to be granted immunity from suit in the United States; a copy of plaintiffs' complaint was attached to the letter. Far from intervening in the case to urge rejection of the suit on the ground that it presented political questions, the Department responded with a letter indicating that Karadžić was not immune from suit as an invitee of the United Nations. *See* Habib Letter, *supra*.[10] After oral argument in the pending appeals, this Court wrote to the Attorney General to inquire whether the United States wished to offer any further views concerning any of the issues raised. In a "Statement of Interest," signed by the Solicitor General and the State Department's Legal Adviser, the United States has expressly disclaimed any concern that the political question doctrine should be invoked to prevent the litigation of these lawsuits: "Although there might be instances in which federal courts are asked to issue rulings under the Alien Tort Statute or the Torture Victim Protection Act

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10 The Habib letter on behalf of the State Department added:

> We share your repulsion at the sexual assaults and other war crimes that have been reported as part of the policy of ethnic cleansing in Bosnia-Herzegovina. The United States has reported rape and other grave breaches of the Geneva Conventions to the United Nations. This information is being investigated by a United Nations Commission of Experts, which was established at U.S. initiative.

that might raise a political question, this is not one of them." Statement of Interest of the United States at 3. Though even an assertion of the political question doctrine by the Executive Branch, entitled to respectful consideration, would not necessarily preclude adjudication, the Government's reply to our inquiry reenforces our view that adjudication may properly proceed.

As to the act of state doctrine, the doctrine was not asserted in the District Court and is not before us on this appeal. *See Filártiga*, 630 F.2d at 889. Moreover, the appellee has not had the temerity to assert in this Court that the acts he allegedly committed are the officially approved policy of a state. Finally, as noted, we think it would be a rare case in which the act of state doctrine precluded suit under section 1350. *Banco Nacional* was careful to recognize the doctrine "in the absence of . . . unambiguous agreement regarding controlling legal principles," 376 U.S. at 428, such as exist in the pending litigation, and applied the doctrine only in a context—expropriation of an alien's property—in which world opinion was sharply divided, *see id.* at 428-30.

Finally, we note that at this stage of the litigation no party has identified a more suitable forum, and we are aware of none. Though the Statement of the United States suggests the general importance of considering the doctrine of *forum non conveniens*, it seems evident that the courts of the former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims, even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiffs' preference for a United States forum.

Conclusion

The judgment of the District Court dismissing appellants' complaints for lack of subject-matter jurisdiction is reversed, and the cases are remanded for further proceedings in accordance with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1541, 1544—August Term, 1994

Petition for Rehearing Decided: January 6, 1996
Submitted: November 15, 1995

Docket Nos. 94-9035, -9069

S. KADIC, on her own behalf and on behalf of her infant sons BENJAMIN and OGNJEN, INTERNATIONALNA INICIATIVA ZENA BOSNE I HERCEGOVINE "BISER," and ZENE BOSNE I HERCEGOVINE,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all other similarly situated,

Plaintiffs-Appellants,

—v.—

RADOVAN KARADŽIĆ,

Defendant-Appellee.

Before:

NEWMAN, *Chief Judge*,
FEINBERG and WALKER, *Circuit Judges*.

Petition for rehearing by defendant-appellee of the October 13, 1995, decision, ___ F.3d ___, reversing and remanding cases to the District Court. Petition denied.

JON O. NEWMAN, *Chief Judge*:

The defendant-appellee's petition for rehearing calls our attention to an interesting law review article not previously cited to us. *See* Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Int'l & Comp. L. Rev. 445 (1995). Professor Sweeney's article endeavors to explore the proper interpretation of the phrase "tort only" in the Alien Tort Act. It concludes that the statute, as enacted in 1789 by the 1st Congress, was intended to authorize federal court jurisdiction for only one limited category of torts—torts committed in violation of the law of nations by the crews of vessels in the course of stopping and boarding ships believed to be aiding the enemy in time of war. Such torts, Professor Sweeney maintains, were litigated before 1789 in state courts exercising admiralty jurisdiction, including "prize jurisdiction," the authority to adjudicate whether a cap-

tor has lawfully seized a ship and its cargo as a prize. After Article III of the Constitution extended the judicial power of the United States to admiralty cases, U.S. Const. art. III, § 2, Congress enacted the provisions of the First Judiciary Act that are now 28 U.S.C. § 1333 (1988) to make that jurisdiction exclusive (except for "saving to suitors" cases in which plaintiff may bring certain maritime claims in state court). But, Professor Sweeney continues, Congress adopted the language that is now 28 U.S.C. § 1350 (1988) to make clear that the jurisdiction of the new federal courts to remedy torts committed against aliens in violation of the internationally recognized law of prize would be exercised by the federal courts concurrently with the state courts. In his view, the language that is now section 1350 extended only to this one category of torts.

Professor Sweeney's argument is interesting, but far from conclusive. Notably absent is any contemporaneous indication from the likely draftsman of the key language, Oliver Ellsworth, or from any other member of the 1st Congress, that their broad statutory language "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States" was intended to apply to only one category of torts. Even if the tort of wrongfully boarding in time of war a ship suspected of aiding the enemy was the tort that prompted the 1st Congress to create federal court jurisdiction for aliens suffering damages in violation of the law of nations or a treaty of the United States, it does not follow that the statute should be confined to this tort. Statutes enacted with one object in the legislative mind are frequently drafted in broad terms that are properly applied to situations within both the literal terms and the spirit of the statute, though not within the immediate

contemplation of the drafters. *See, e.g.*, 42 U.S.C. § 1985(3) (1988) (part of so-called "Ku Klux Klan Act" of 1871, creating damage remedy for injury by those who "conspire, or go in disguise on the highway" for purpose of denying "equal protection of the laws"); *see also Keating v. Carey*, 706 F.2d 377, 386-88 (2d Cir. 1983).

In any event, however we might have construed the Alien Tort Act in a case arising in 1789, two circumstances guide our interpretation two hundred years later. First, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), has established as the law of this Circuit that the Alien Tort Act has a broad scope and that courts ascertaining the content of the law of nations "must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." *Id.* at 881. We have neither the authority nor the inclination to retreat from that ruling. Second, Congress has made clear that its enactment of the Torture Victim Protection Act of 1991 was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens. *See* H.R. Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), *reprinted in* 1992 U.S.C.C.A.N. 84, 86. With a broad reading of the Alien Tort Act settled as the law of this Circuit and codified by Congress as recently as 1991, we decline the invitation to limit the Act to the one category of torts that arguably prompted its enactment.

The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JANE DOE I,
on behalf of herself and all
others similarly situated,

-and-

JANE DOE II,
on behalf of herself and as
administratrix of the estate of
her deceased mother, and on
behalf of all others similarly
situated,

Plaintiffs,

- against -

RADOVAN KARADZIC,

Defendant.

OPINION AND ORDER

93 Civ. 0878 (PKL)

S. KADIC,
on her own behalf and on
behalf of her infant sons
BENJAMIN and OGNJEN,
INTERNATIONALA INICIATIVEZENA
BOSNE I HERCEGOVINE "BISTER,"
and ZENE BOSNE I HERCEGOVINE,

Plaintiffs,

- against -

RADOVAN KARADZIC,

Defendant.

93 Civ. 1163(PKL)

LEISURE, District Judge:

These two related actions, Doe et al. v. Karadzic, 93 Civ. 0878 (PKL) and Kadic et al. v. Karadzic, 93 Civ. 1163 (PKL), have been brought before this Court pursuant to: the Alien Tort Act, 28 U.S.C. §1350 (1948); the Torture Victim Protection Act, Pub.L. No. 102-256, 106 Stat. 73 (1992) also codified at 28 U.S.C. §1350; federal question jurisdiction, 28 U.S.C. §1331; and the principles of supplemental jurisdiction, 28 U.S.C. §1367.

Jane Doe I and Jane Doe II, on behalf of themselves and the members of their respective classes (collectively the "Doe Plaintiffs"), seek compensatory and punitive damages for acts of rape and other human rights violations committed by forces under the command and control of defendant Radovan Karadzic. Complaint Jane Doe I and Jane Doe II v. Radovan Karadzic, 93 Civ. 0878 (PKL), filed February 11, 1993, ("Doe Complaint") at ¶¶1, 6. Defendant Karadzic is the leader of the Bosnian-Serb military faction, which is fighting against the government of Bosnia-Herzegovina, id. at 6, and is also the self-proclaimed president of the unrecognized Bosnian-Serb entity. Doe Memorandum in Opposition to Defendant's Motion to Dismiss (Doe Mem.:) at 4; Doe Complaint at ¶15.

Plaintiffs in the related action, Kadic et al. v. Karadzic ("Kadic Plaintiffs"), seek injunctive relief and compensatory and punitive damages for personal injuries suffered as a result of inter alia, genocidal acts, torture, extrajudicial killing, and other violations of the law of nations. Complaint S.K. et al. v. Radovan Karadzic, 93 Civ 1163 (PKL), filed March 2, 1993, ("K. Complaint") at ¶1. Doe Plaintiffs and K. Plaintiffs (collectively the "plaintiffs") claim that they and others similarly situated are the victims of a genocidal campaign designed, authorized and directed by Karadzic.

Defendant Karadzic now moves pursuant to Fed.R.Civ.P. 12(b)(1), (21), (4), (5), and (6), for an order dismissing plaintiffs' actions on the following grounds: lack of subject matter jurisdiction, lack of personal jurisdiction,

insufficiency of service of process, and nonjusticiability. For the reasons set forth below, defendant's motion to dismiss for lack of subject matter jurisdiction is granted and the actions are hereby dismissed.[1]

BACKGROUND

On February 29, 1992, the Croats and Muslims of Bosnia-Herzegovina declared independence from Yugoslavia by popular referendum. Serbs living within Bosnia-Herzegovina boycotted the referendum and declared their own independence from the new nation, claiming a part of its

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[1] In a Memorandum Order, dated September 23, 1994, this Court granted defendant an additional week in which to submit his reply papers. In that Order, defendant was admonished not to raise issues for the first time in his reply, and that such issues would be treated as a nullity. In his reply, Defendant submitted the affidavit of Agent Deibler ("Deibler Affidavit"). In turn, Doe Plaintiffs sought leave to file a sur-reply in order to address arguments contained in defendant's reply papers, specifically those contained in Deibler's Affidavit. Deibler's Affidavit primarily addresses the adequacy of service on defendant, an issue that was previously raised in defendant's motion, yet the affidavit presents additional facts. Furthermore, Deibler's affidavit raises for the first time the issue of fund raising. In order to allow this Court more fully to address the issues raised in the instant motion, this Court herein, grants Doe Plaintiffs leave to file the aforementioned sur-reply, previously submitted to the Court. Accordingly, in addressing the arguments raised by the instant motion, the Court has considered defendant's reply papers in their entirety, as well as the papers submitted by plaintiffs in their sur-reply, including the State Department command post logs submitted to the Court on October 26, 1993.

territory for their own.[2] This Bosnian-Serb entity has not been formally recognized internationally, nor has it been recognized by the United Nations. Doe Mem. at 4, n. 3; Doe Complaint at ¶15.[3] The conflict between the Serbs and Muslims of Bosnia-Herzegovina escalated towards a state of civil war between the several ethnic factions within Bosnia-Herzegovina. The instant related actions arise out of acts allegedly engaged in by members of the forces under the command of defendant, and conducted in furtherance of defendant's attempt to gain power and control in Bosnia-Herzegovina. Doe Mem. at 4-5; Kadic Memorandum Submitted in Opposition to Defendant's Motion ("K. Mem.") at 2.

On February 11, 1993, Doe Plaintiffs filed their class action complaint, seeking redress on behalf of all women and men who were victims of the following torts inflicted by Bosnian-Serb military forces under the command of defendant: genocide, war crimes,[4] summary execution, wrongful death, torture, cruel, inhuman or degrading treatment, assault and battery, rape and intentional infliction of emotional harm. The class includes many thousands of people who have been subject to human rights abuses. Doe Complaint at ¶¶10-11. Doe plaintiffs alleged that Bosnian-Serb forces have systematically

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[2] See Chuck Sudetic, Turnout in Bosnia Signals Independence, N.Y. Times, March 2, 1992, at A3. See also, Chronology of Bosnia War, N.Y. Times, February 6, 1994, at Section 1, page 12; Doe Mem. at 3 (presenting a somewhat different chronology of events).

[3] See Chuck Sudetic, Belgrade Issues Warning to Bosnian Serbs, N.Y. Times, August 3, 1994, at A10. (stating that "[t]he Srpska Republic is the government proclaimed by the Bosnian Serb rebels")

[4] Doe's claim for "war crimes and crimes against humanity" shall be referred to hereafter as "war crimes."

employed brutal violence against Bosnian Muslims. These abuses are collectively referred to as "ethnic cleansing." Id. at ¶17.

Kadic Plaintiffs also allege that defendant Karadzic designed, ordered, implemented, and directed a campaign of "ethnic cleansing." K. Complaint at ¶14. K. Plaintiffs allege that this campaign included, inter alia, massacres, selective murders, pillage, forced detention, and forced evacuations. Specifically, K. herself alleges that she witnessed the murder of her son, the burning of her home, and that she was repeatedly raped. K. Plaintiffs allege that these and other acts were conducted pursuant to the order and direction of defendant Karadzic, and that such acts continue to the present.

On February 11, 1993, the same day the Doe Complaint was filed, Jonathan Soroko ("Soroko") attempted to effect service on Karadzic in the lobby of Karadzic's hotel, the Hotel Inter-Continental, 111 East 48th Street, New York, New York. Affidavit of Jonathan Soroko, submitted in support of Doe Mem., sworn to on February 12, 1993 ("Soroko Aff."), at ¶4. At the time, Karadzic was surrounded by a security detachment led by Special Agent R.A. Diebler ("Diebler"), a Special Agents of the Diplomatic Security Service of the United States Department of State. When Soroko attempted to serve Karadzic, Diebler's security team executed a procedure designed to cover and evacuate Karadzic, forming a ring around Karadzic and rushing him into the elevator. Affidavit of Agent Roy Anthony Diebler, sworn to on September 30, 1993, ("Diebler Aff.") at ¶¶10-12.[5] The record contains

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[5] Agent Diebler states in his sworn declaration the following:

> As we reached the middle of the lobby [in the hotel] the man [Soroko] got out of his chair and moved quickly toward our formation. One of the agents sounded an alarm and we immediately "covered and evacuated." This is standard procedure. The agents closed the formation around Dr. Karadzic, got his head

conflicting affidavits regarding the attempted service. Soroko contends that he was no more than two feet from defendant, Soroko Aff. at ¶4, while Diebler contends that "the man [Soroko] could not have gotten any closer to Dr. Karadzic than 6-8 feet at the any closer to Dr. Karadzic than 6-8 feet at the most." Diebler Aff. at ¶13. It is not disputed, however, that during the attempted service, Soroko called out words declaring that defendant was served. Soroko Aff. at ¶4; Diebler Aff. at ¶12. Diebler asserts that prior to leaving the United States, Karadzic had no knowledge that Soroko was attempting to serve him with process. Diebler Aff. at 14.

On March 2, 1993, Kadic Plaintiffs filed their related complaint, alleging tortious conduct, including, inter alia, rape, forced prostitution, forced pregnancy, forced childbirth, and gender and ethnic discrimination. On March 4, 1994, after attempts by professional process servers proved unsuccessful, see K. Mem. at 2, see also, Deibler Aff. at ¶ 17, the Honorable

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> down, I held him physically and moved as quickly as possible to the waiting elevator.
>
> The man came right at me and I believe I was the first to physically touch him. As he approached he reached into his jacket and removed what I was told later turned out to be papers. I batted his hand away.
>
> After I batted his hand away, he was stopped and questioned by two of my agents...The man shouted words to the effect "You've been served. You've been served." By that time Dr. Karadzic and the agents evacuating him, including me, were about 30 feet away and ready to enter the elevator.
>
> Diebler Aff. at ¶¶ 12-13. After he attempted service, Soroko was questioned by agents, and informed them that he was attempting to serve process on Karadzic.

Richard Owen, United States District Judge, Southern District of New York, granted a motion for leave to effect service upon defendant by alternate means. On March 5, 1993, a copy of the summons and complaint was delivered by a United States Marshal to special Agent Diebler, who personally delivered them that day to Karadzic. See K. Mem. at 2-3; Deibler Aff. at ¶18. On May 10, 1993, Karadzic filed the instant motion to dismiss.

DISCUSSION

I. Karadzic's Motion to Dismiss

A. INITIAL CONSIDERATIONS

As an initial matter, this Court notes that "federal judicial power is limited to those disputes... which are traditionally thought to be capable of resolution through the judicial process." Flast v. Cohen, 392 U.S. 83, 97, 88 S.Ct. 1942, 1951, 20 L.Ed.2d 947 (1968). It is well settled that no justiciable controversy is presented when the parties seek an advisory opinion. Id. at 95, 88 S.Ct. at 1949-50. Furthermore, "a judicial declaration subject to discretionary suspension by another branch of government may easily be characterized as an advisory opinion." Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure, at §3529.1 (1984) (citations omitted).

Given that Karadzic's present lack of head-of-state immunity is conditioned upon a decision of the Executive Branch not to recognize a Bosnian-Serb nation and not to acknowledge Karadzic as an official head-of-state,[6] plaintiffs'

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[6] See Affidavit of Martha F. Davis submitted in Opposition to Defendant's motion to Dismiss ("Davis Aff.") at Exhibit C (letter from Michael J. Habib, Director of Eastern European Affairs, U. S. Department of State, discussing the Department of State's refusal to extend immunity to Radovan Karadzic during his visits to the United Nations).

claims for relief could potentially become a request for an advisory opinion if the State Department were to declare defendant a Head of State. "A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts." Lafontant v. Aristide, 844 F. Supp 128, 131 (E.D.N.Y. 1994) (Weinstein, J.). As the Aristide court held, the [d]etermination of who qualifies as a head-of-state is made by the Executive Branch, it is not a factual issue to be determined by the courts. No judicial hearing or factual determination aside from receipt of the State Department's communication is warranted." Lafontant v. Aristide, 844 F. Supp. at 130. In Aristide, after the State Department submitted a letter, filed with the Court by the Justice Department pursuant to 28 U.S.C. §517, the court promptly entered a final judgment, quashing service of process on defendant and dismissing the action. Id. (collecting cases in which absolute immunity was accorded a head-of-state) See In Re Doe, 860 F.2d 40, 44-46 (2d Cir. 1988). Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction. See Lafontant v. Aristide, 844 F. Supp at 130.[7] This consideration, while not

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[7] "[I]n Saltany v. Reagan, 702 F. Supp. 319, 320 (D.D.C. 1988), residents of Libya brought suit against Prime Minister Margaret Thatcher of the United Kingdom, for alleged violations of international law. Pursuant to 28 U.S.C. §517 the State Department submitted an immunity letter, suggesting that the court grant Prime Minister Thatcher immunity as the head of government of a friendly foreign state. The court accepted the State Department's suggestion as conclusive, and granted immunity." Lafontant v. Aristide, 844 F. Supp. at 132. See Restatement (Second) of Foreign Relations Law of the United States (1962) § 66 (head-of-state can be either the head-of-state or head of government).

See generally Roger Cohen, Washington Might Recognize a Bosnian Serb State, N.Y. Times, March 13, 1994, at A10. (stating that as President of his nation, Karadzic may qualify as "an organ of a foreign state or political subdivision thereof" under the Foreign Sovereign Immunities Act ("FSIA"),

dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action.

B. SUBJECT MATTER JURISDICTION

Plaintiffs bring these related actions pursuant to the Alien Tort Claim Act; the Torture Victim Protection Act ("TVPA"); federal question jurisdiction; and the principles of supplemental jurisdiction. Doe Plaintiffs suggest in their memorandum submitted in opposition, that this Court should not address the issue of subject matter jurisdiction because defendant, who moved for dismissal pursuant to Fed.R.Civ.P. 12(b)(1), did not brief the issue. Doe Mem. at 3 n. 2. Nevertheless, "[i]t is common ground that in our federal system of limited jurisdiction any party or the Court sua sponte, at any stage in the proceedings, may raise the question of whether the court has subject matter jurisdiction." United Food & Commercial Workers Union v. Centermark Props. Meriden, 30 F.3d 298, 301 (2d Cir. 1994) (citation omitted). Accordingly, this Court must address the issue of subject matter jurisdiction.

1. This Court Does Not Have Jurisdiction Pursuant To The Alien Tort Claim Act

The Alien Tort Claim Act, 28 U.S.C. §1350, grants the district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. §1350. Since plaintiffs do not contend that their claim arises under a treaty of the United States, this Court, in order to determine whether it has subject matter jurisdiction pursuant to § 1350, must examine whether the actions of defendant, alleged herein, constitute an actionable violation of the law of nations under

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28 U.S.C. §1603(b)(2), and therefore be immune from suit).

the statute.

The Second circuit has found that only conduct which rises to the level of an "international common law tort" by violating universally accepted standards of human rights is within the law of nations, and thus within the subject matter jurisdiction of the Act. Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980). In Filartiga, the Second Circuit consulted modern sources of international law including judicial decisions and scholarly works, in order to determine what constituted the law of nations. Id. at 880-81 (citing The Paquete Habana, 175 U.S. 677, 700, 30 S.ct. 290, 299, 44 L.Ed.2d 320 (1900)).[8]

Historically, the "traditional view of the international law [was] that it establish[ed] substantive principles for determining whether one country had wronged another." Banco National de Cuba v. Sabbatino, 376 U.S. 398, 422, 84 S.Ct. 923, 937, 11 L.Ed.2d 804 (1964). "Classical international law was predominantly statist. The law of nations traditionally was defined as 'the body of rules and principles of action which

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[8] Beginning with Filartiga, courts have recognized a wide range of international common law torts, which, when committed under the color of state law, have been held to be actionable under the Alien Tort Act including, inter alia, torture, slave trade, and piracy, Filartiga, 630 F.2d at 890; genocide and cruel, inhuman or degrading treatment, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 781, (D.C. Cir. 1984) (Edwards, J. concurring); summary execution, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541-42 (N.D. Cal. 1987) ("official torture constitutes a cognizable violation of the law of nations"); wrongful death, Linder v. Portocarrero, 963 F.2d 332, 336 (11th Cir. 1992); and war crimes. See also Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (holding war crimes to be universally recognized violations of international law, but not specifically considering the Alien Tort Act), cert. denied, 475 U.S. 1016 (1986). See also Louis Henkin, The Age of Rights 75-76 (1990).

are binding upon civilized states in their relation to one another.'" Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 792 n. 22 (D.C. Cir. 1984) (Edwards, J.) (quoting J. Brierly, The Law of Nations 287 at 1 (6th ed. 1963)) (emphasis in original). Accord Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988)("The standards by which nations regulate their dealings with one another inter se constitute the 'law of nations.' These standards include the rules of conduct which govern the affairs of this nation, acting in its national capacity, in relationships with other nations.") (citations omitted). Over time, the view that international law applied only as between nations evolved, such that international law became applicable to nations acting against their own citizens or to a foreign government acting against an individual. See Filartiga, 630 F.2d at 884-85.

In Filartiga, the Second Circuit held that official torture constituted an actionable claim within the subject matter jurisdiction of the court under §1350. In reaching this conclusion the Second Circuit stated that "[t]orture...is defined as any act by which severe pain and suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official." Id. at 882 (citing General Assembly Resolution 3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N.Doc A/1034 (1975))(emphasis added). The Filartiga Court went on to hold that acts of official torture committed by a government either against aliens, or against nationals of the acting state, violate the law of nations. Filartiga, 630 F.2d at 884-85. The Second Circuit, in Filartiga, reached the conclusion that "official torture is now prohibited by the law of nations." Id. at 885 (emphasis added).

Since Filartiga, §1350 has been applied by a handful of federal courts, and the decision reviewed by this Court reinforce the conclusion that acts committed by non-state actors do not violate the law of nations. Most notable, perhaps, is the opinion by the United States Court of Appeals for the District of Columbia in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C.Cir. 1984). In Tel-Oren, survivors and representatives of persons murdered by the Palestine

Liberation Organization ("PLO") brought suit pursuant to 28 U.S.C. §§1350 and 1331. The District Court dismissed the action for lack of subject matter jurisdiction. The District of Columbia Circuit panel, writing three separate concurring opinions, affirmed the district court's dismissal. In his opinion, Judge Edwards embraced the holding of Filartiga, but specifically declined to extend Filartiga or the application of §1350 to non-state actors.[9] Judge Edwards stated that "[t]he extension would require this court to venture out of the comfortable realm of established international law -- within which Filartiga firmly sat -- in which states are the actors. It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals." Tel-Oren, 726 F.2d at 792. Judge Edwards also stated that the law of nations does not impose "the same responsibility or liability on non-state actors [] as it does on states and persons acting under color of state law." Id. at 776. Judge Edwards concluded that since "the PLO is not a recognized member of the community of nations" an action brought pursuant to §1350 would not lie. Id. at 792. Accordingly, Judge Edwards "decline[d] to read section 1350 to cover non-state actors, absent guidance from the Supreme Court on the statute's usage of the term 'law of nations.'" Id. at 795.[10]

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[9] Judge Bork found that §1350 did not provide a cause of action, and Judge Robb concluded that the case presented nonjusticiable "political question."

[10] It should be noted that causes of action have been brought against the PLO with Federal Courts basing their jurisdiction on other grounds. In Klinghoffer v. S.N.C. Achille Lauro, 739 F.Supp. 854 (S.D.N.Y 1990) jurisdiction was based on admiralty, pursuant to 28 U.S.C. §1333, and in United States v. Palestine Liberation Organization, 695 F.Supp. 1456 (S.D.N.Y. 1988) the cause of action was brought pursuant to the Anti-terrorism Act, 22 U.S.C. §§5201-5203.

Since Tel-Oren, a number of Federal Courts have applied §1350, but, in doing so, have also declined to extend it to cover the conduct of non-state actors. In Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C.Cir. 1985), a group of Nicaraguans brought a claim pursuant to § 1350, seeking redress for tortious injuries which they and their families suffered at the hands of the Nicaraguan Contra Forces ("Contras"). Id. at 205. Plaintiffs' claims arose out of alleged attacks by the Contras on Nicaraguan civilians which resulted in, inter alia, summary execution, murder, abduction, torture, rape, and woundings. Id. In holding that plaintiffs' claims could not be remedied under the Alien Tort Statute, Judge (now Justice) Scalia stated the following:

> "[w]e are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations --so-called 'customary international law,'arising from 'the customs and usages of civilized nations,'--we conclude that this also does not reach private, non-state conduct of this sort."

Id. at 206-07 (citations omitted). Accordingly, the District of Columbia Circuit dismissed the claims brought pursuant to §1350. Id. See also Linder v. Calero Portocarrero, 747 F. Supp 1452, 1462, 1469 n.8 (S.D.Fla. 1990) (stating "[t]he contras are private individuals whose actions simply do not represent state action," and that "[t]he Contras have not been recognized as the legitimate government of Nicaragua by the United States").

In Carmichael v. United Technologies Corp., 835 F.2d 109, 113 (5th Cir. 1988), the Fifth Circuit, while not deciding the issue, opined "that the Alien Tort Statute does not confer subject matter jurisdiction over private parties who conspire in or aid and abet, official acts of torture."[11] Id. at 113-14. In

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[11] The Fifth Circuit defined "official torture" as torture by officials shown to be officially condoned by the nation. Id. at 114. (emphasis added).

Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987), the district court echoed Justice Scalia's sentiments when it stated: "[o]f course, purely private torture will not normally implicate the law of nations, since there is currently no international consensus regarding torture practiced by non-state actors." Id. at 1541.

Courts that have found causes of action to lie pursuant to §1350, have done so when state actors violated the law of nations. See e.g., Filartiga, 630 F.2d at 880 (Paraguayan state official); In Re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992) (defendant controlled military police and acted under martial law declared by then-President Marcos); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992) (Argentine military officials); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D.Cal. 1987) (former Argentine General).

This Court finds that the acts alleged in the instant action, while grossly repugnant, cannot be remedied through 28 U.S.C. § 1350. The current Bosnian-Serb warring military faction does not constitute a recognized state any more than did the PLO, as it existed at the time that the District of Columbia Circuit decided Tel-Oren, or than did the Nicaraguan Contras at the time Justice Scalia decided Sanchez-Espinoza.[12] Accordingly, this Court finds that the members of Karadzic's faction do not act under the color of any recognized state law. See, e.g., Sanchez-Espinoza v. Reagan, 770 F.2d at 202; Tel-Oren 726 F.2d at 791; Linder v. Calero Portocarrero, 747 F. Supp 1452, 1462 (S.D.Fla. 1990) ("[t]he

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[12] The Second Circuit has limited the definition of 'state' to "entities that have a defined and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other such entities." Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 47 (2d Cir. 1991) (quotations, brackets and citation omitted). The current Bosnia-Serb entity fails to meet this definition.

contras are private individuals whose actions simply do not represent state action").

The situation in the former Yugoslavia is such that the present military factions are less stable and less identifiable than was the PLO at the time of Tel-Oren. The Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO, as manifested by the PLO's achieving the position of a permanent observer at the U.N.[13] Based on the teaching of the aforementioned case authorities, it follows that plaintiffs cannot contend that the acts allegedly being conducted are either official torture or state initiated. See Tel-Oren, 726 F.2d at 791. This Court declines to extend §1350 to redress acts of torture engaged in by private individuals.

2. This Court Does Not Have Jurisdiction Pursuant To The Torture Victim Protection Act

Plaintiffs also advance the position that this Court has subject matter jurisdiction based on the Torture Victim Protection Act ("TVPA"). See Torture Victim Protection Act of 1991, Pub.L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350). The TVPA provides an express private right of action against "an individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another individual to torture or extrajudicial killing. Id. The TVPA was enacted to codify the private right of action against official torture set forth in Filartiga. LaFontant v. Aristide, 844 F. Supp at 138 ("[t]he TVPA codifies the holding in Filartiga v. Pena-Irala") (Weinstein, J.). See H.R. Rep. No 367, 102nd Cong., 1st Sess. 3-4 (1991) ("House

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[13] The PLO was granted permanent observer status at the United Nations in 1974, and "[s]ince 1974, the PLO has continued to function without interruption as a permanent observer and has maintained its mission to the U.N. without trammel." United States v. PLO, 695 F. Supp at 1459.

Report"), reprinted in 1992 U.S.C.C.A.N. 84, 85-86; S. Rep. No. 249, 102nd Cong., 2d Sess. 3-7 (1991) ("Senate Report").

The TVPA, a relatively new statute, passed in 1992, has been construed by only a few Federal Courts. This Court, having looked to the language of the statute and to the legislative history, concludes that both the language and legislative history clearly indicate that the statute only extends to actions carried out under the authority or color of law of an entity recognized by the United States as a foreign nation.

On its face the TVPA gives federal courts jurisdiction over suits against foreign officials who kill illegally on foreign territory. It provides in part:

> Sec. 2. (a) Liability. -- An individual who, under actual or apparent authority, or color of law, of any foreign nation -- (1) subjects an individual to torture shall, in a civil action, be liable for damages... or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages...
>
> (b) Exhaustion of remedies. -- A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

28 U.S.C. § 1350 note (1992) (emphasis added). As the House Report on the bill explains:

> [t]he phrase 'under actual or apparent authority, or color of law' makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim...The bill does not attempt to deal with torture or killing by purely private groups.

House Report at 5, USCCAN 1992, p. 87. Similarly, the Senate Report states the following:

> [t]his legislation does not cover purely private criminal acts by individuals or nongovernmental organizations...the phrase 'actual or apparent authority or under color of law' is used to denote torture and extrajudicial killings committed by officials both within and outside the scope of their authority.

Senate Report 249 at 8.

Clearly, the TVPA was designed to protect individuals from acts taken by foreign government officials or foreign governments. On its face, the TVPA requires a plaintiff's claim for relief to be based on actions taken under color of law of any foreign nation. The legislative history reflects the same reading. This reading of the TVPA is entirely consistent with and, indeed, supports this Court's holding with respect to the Alien Tort Claim act, supra, since the TVPA was also codified at §1350.

Both the Senate and House Reports state that courts should look to principles of liability under 42 U.S.C. §1983 in construing the "color of law" phrase in the TVPA. See Senate Report at 8; House Report at 5. A plaintiff can only meet the requirements of § 1983 to establish that a defendant has acted "under color of state law" if he alleges sufficient "state action" to make out a constitutional violation. The conduct of the defendant must be somehow chargeable to the state in question. See, e.g., Dwares v. City of New York, 985 F.2d 94, 97 (2d Cir. 1993) ("it is well established that in order to state a claim under §1983, a plaintiff must allege that the challenged conduct was attributable at least in part to a person acting under color of state law."); Merola v. Nat'l R.R. Passenger Corp., 683 F. Supp. 935, 940 (S.D.N.Y. 1988).

As discussed above, Karadzic does not act with the authority of any foreign nation. In fact, K. Plaintiffs' moving papers describe Karadzic as "neither a head of state nor a diplomat of a recognized state." K. Mem. at 5. K. plaintiffs further acknowledge that "Karadzic is not an official of any government." K. Mem. at 21 n. 25. Accordingly, finding that

the acts attributed to defendant are those of private individuals, similar to those of the Contras, and finding that the TVPA clearly was enacted to redress acts of torture by governments or government officials, plaintiffs' cause of action against defendant based on the TVPA cannot lie. [14]

3. This Court Does Not Have Jurisdiction Pursuant To An Implied Right of Action Under §1331

Plaintiffs also bring their causes of action under 28 U.S.C. §1331, subject matter jurisdiction arising under a federal question. Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the constitution, laws, or treaties of the United States."

It has been recognized in this Circuit that substantive international law is incorporated into the law of the United States. See Filartiga, 630 F.2d 876, 887 (2d Cir. 1980). As discussed above, jurisdiction in this action cannot lie based on the express causes of action set forth by Congress in the TVPA or the Alien Tort Claim Act. Accordingly, the only other jurisdictional grounds for Plaintiffs to assert in this matter would be to base their claims on an implied right of action arising out of the law of nations. As Judge Edwards stated in

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[14] Additionally, the Court notes that section 2 of the TVPA clearly requires litigants to exhaust the adequate and available remedies in the location of the tort. On the present record before this Court, there is insufficient evidence addressing whether plaintiffs have attempted to seek remedies in the place in which the conduct giving rise to the claim occurred, nor is there sufficient evidence shedding light on the issue of whether, given the present situation in former Yugoslavia, such remedies are available or would be adequate. See Amicus Curiae Memorandum Submitted in Opposition to Defendant's Motion by the International Human Rights Law group, dated August 27, 1993 ("IHR Amicus"), at 26, (noting "two criminal cases were recently brought in Sarajevo and resulted in death sentences").

Tel-Oren 726 F.2d at 779-80 n. 4., "the language of §1331, unlike §1350, suggests that plaintiffs must identify a remedy granted by the law of nations or argue successfully for one to be implied."

This Court declines to find an implied right of action arising under the law of nations, specifically in view of the fact that Congress has addressed the matter and created two express causes of action in the form of the Alien Tort Claim Act and the TVPA, codified at §1350. Presumably, Congress did not lack power to confer subject-matter jurisdiction over such an action, but declined to do so. See Senate Report at 5-6. See also Sugrue v. Derwinski, 26 F.3d 8, 12 (2d Cir. 1994) (declining to find a new private right of action, and stating that "Congress is in a far better position than a court to evaluate the impact of a new species of litigation"). As Judge Kearse stated in Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 429 (2d Cir. 1987) (Kearse, J. dissenting), rev'd on other grounds, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed.2d 818 (1989), "though substantive international law is part of the common law of the United States... federal court subject-matter jurisdiction is not a matter of common law. Such jurisdiction exists only to the extent that Congress has bestowed it, in the exact degree and character which to Congress may seem proper for the public good." Id. (citations and quotations omitted).

Further, as discussed above, "the law of nations provides no substantive right to be free from the private acts of individuals." See Tel-Oren, 726 F.2d at 779-80 n. 4; In Re Estate of Ferdinand E. Marcos, 978 F.2d 493, 501 (9th Cir. 1992)("[o]nly individuals who have acted under official authority or under color of such authority may violate international law"). Since private acts of individuals do not violate the law of nations, even assuming arguendo, that this Court were willing to attempt to find an implied cause of action, which it is not, this Court is doubtful that one could be implied as to the defendant because the acts attributed to him were performed in a private capacity. Accordingly, those allegedly harmed by the acts of defendant cannot assert an

implied right of action arising from the law of nations and § 1331. See Tel-Oren, 726 F.2d at 779-80 n.4.

Absent a clear statute from Congress, or direction from higher Courts, this court finds that actions based only on § 1331 without an express right of action granted by Congress, must be dismissed for lack of subject-matter jurisdiction.

II. Plaintiffs' State Law Claims

In general, "a district court may exercise supplemental jurisdiction over pendent state claims when it has jurisdiction over associated federal claims that 'form part of the same case or controversy.'" Sriram v. Preferred Income Fund, 22 F.3d 498, 501 (2d Cir. 1994) (quoting 28 U.S.C. §1367).[15] See United Mine Workers v. Gibbs, 383 U.S. 715, 725-28, 86 S.Ct. 1130, 1138-40, 16 L.Ed2d 218 (1966). As the Second Circuit has recently reiterated, a district court's exercise of supplemental jurisdiction is within its discretion. Vally Disposal, Inc. v. Central Vermont Solid Waste Management District, 31 F.3d 89, 103 (2d Cir. 1994)(citing Block v. First Blood Assocs., 988 F.2d 344, 351 (2d Cir. 1993) ("The decision whether to exercise pendent jurisdiction is within the discretion

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[15] 28 U.S.C. §1367, enacted Dec l, 1990, codified the law with regard to pendent party, pendent claim, and ancillary jurisdiction by granting federal district courts "supplemental jurisdiction over all other claims that are so related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." Id. The statute abandons the old labels of pendent and ancillary jurisdiction, but preserves the principles established under the doctrines, referring to all such jurisdiction as "supplemental." See Denis F. McLaughlin, The Federal Supplemental Jurisdiction Statute--A Constitutional & Statutory Analysis, 24 Ariz. St. L.J. 849 (1992).

of the district court.")). See Purgess v. Sharrock, 33 F.3d 134, 138 (2d Cir. 1994) ("Just as with the prior law of pendent jurisdiction, the exercise of supplemental jurisdiction is left to the discretion of the district court.").

Having dismissed plaintiffs' federal claims, plaintiffs' state claims also should be dismissed for lack of jurisdiction. In general, in order to invoke supplemental jurisdiction, there must be an underlying cognizable federal claim. In this case, plaintiffs' federal claims have been dismissed. When the district court has dismissed all claims over which it has original jurisdiction, the court may decline to exercise supplemental jurisdiction. 28 U.S.C. §1367(c)(3). "'[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors... will point toward declining to exercise jurisdiction over the remaining state-law claims.'" Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir. 1992) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350, 108 S.Ct. 614, 619, 98 L.Ed.2d 720 (1988)). See Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139 (holding that the general rule is that, when all federal claims are dismissed before trial, the district court should relinquish jurisdiction over pendent state-law claims rather than resolving them on the merits). Thus, this Court declines to assert supplemental jurisdiction over plaintiffs' state claims. Accordingly, plaintiffs' state law claims are hereby dismissed.

CONCLUSION

For the foregoing reasons, this Court hereby grants Karadzic's motion to dismiss for lack of subject-matter jurisdiction. Accordingly, plaintiffs' claims are hereby dismissed in their entirety.

SO ORDERED

September 7, 1994
New York, New York

Peter K. Leisure

U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 26th day of January one thousand nine hundred and ninety-six.

JANE DOE I, on behalf of herself and all others similarly situated; and JANE DOE II, on behalf of herself and as administratrix of the estate of her deceased mother, and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v

RADOVAN KARADZIC,

Defendant-Appellee.

STAMPED FILED
Jan. 26, 1996

Dkt. No: 94-9035
(94-9060)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellee:

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk

By: /S/

Beth J. Meador,
Administrative Attorney